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The Open Door: Will the Right to Die Survive *Washington v. Glucksberg* and *Vacco v. Quill*?

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**THE OPEN DOOR:
WILL THE RIGHT TO DIE SURVIVE *WASHINGTON V.
GLUCKSBERG*¹ AND *VACCO V. QUILL*?²**

Adam J. Cohen*

*"I think it was a far more encouraging result than almost anyone expected. And the Court, far from slamming the door, in fact, if you look at it carefully, left it open by a vote of nine to nothing."*³

INTRODUCTION

On May 12, 1995, the Michigan Court of Appeals affirmed the issuance of a permanent injunction forbidding Dr. Jack Kevorkian "from employing any device to assist a person in committing suicide."⁴ After a brief legal discussion, the unanimous court vauntingly concluded with the following admonition:

Defendant stated under oath that he would continue to aid in suicides. . . . Defendant has made clear that he stands ready to assist people in ending their lives. Defendant has made clear that neither the actions of the Legislature, the executive branch, nor the judiciary will sway him from his course. We will see.⁵

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¹ 117 S. Ct. 2258 (1997).

² 117 S. Ct. 2293 (1997).

³ Statement of Laurence Tribe, *NPR Morning Edition: Supreme Court Rulings* (National Public Radio broadcast, June 27, 1997).

⁴ *People v. Kevorkian*, 210 Mich. App. 601 (1995), *aff'd* No. 90-390963, slip op. (Mich. Cir. Ct., Feb. 5, 1991), *appeal denied*, 451 Mich. 874 (1996), and *cert. denied*, 117 S. Ct. 296 (1996).

⁵ *Id.* at 608.

Since the original issuance of that injunction, Kevorkian has openly assisted the suicides of approximately 100 persons.⁶ After six failed prosecutions, authorities have virtually abandoned the effort to stop him.⁷ Even his detractors must concede that Kevorkian's strategy of vindicating the "right to die" on behalf of those for whom he provides assistance—resolute disobedience of, and flagrant disrespect for, the law⁸—has proven extremely successful.

Most other assisted-suicide advocates, however, have attempted to initiate change in the law⁹ rather than clash with it so dramatically. Shortly after Washington voters rejected an initiative to legalize physician-assisted suicide in 1991,¹⁰ one of the attorneys who had

⁶ *Lawyer Puts Kevorkian Cases at 'Nearly 100'*, N.Y. TIMES, Aug. 14, 1997, at A21.

⁷ *Prosecutors Say They Won't Charge 'Dr. Death' Unless Changes Are Made; For Now, Law Holds No Sting For Kevorkian*, CHI. TRIB., Oct. 17, 1997, at N23. One county prosecutor has met with Kevorkian to arrange "more dignified" ways for him to deliver the bodies of the persons he assists in suicide. Kristin Storey, *Kevorkian, Marlinga Work on Better Plan for Dropping Off Bodies*, DETROIT NEWS, Oct. 7, 1997, at D3.

⁸ See also *Kevorkian Burns Order to Stop Assisting Suicides*, CHI. TRIB., Apr. 5, 1997, at N16; *Kevorkian Dresses as Jefferson at New Trial*, BOSTON GLOBE, Apr. 2, 1996, at 8. Once asked by commentator Andy Rooney why he seemed to get enjoyment out of his criminal trials, Kevorkian explained, "What looks like enjoyment is the sneer of contempt. It's not a smile." *60 Minutes: Andy Rooney* (CBS television broadcast, May 19, 1996).

⁹ It should be noted that four states—Maryland, Ohio, Vermont, and Virginia—have no common law or statutory prohibition against assisting a suicide. Ohio even has explicit authority supporting its legality. See *State v. Sage*, 31 Ohio St. 3d 173, 177-78 (1987); *City of Akron v. Head*, 73 Ohio Misc. 2d 67, 70 n.4 (Ohio Mun. 1995). The attorney general of Maryland believes that despite confusion in the state's law, assisting a suicide is probably illegal there. See 93 Op. Md. Att'y Gen. 36 (1993). Bills have been introduced to legalize physician-assisted suicide in Vermont, see H.B. 109, 64th Biennial Sess. (Vt. 1997), and to criminalize it in Virginia, see H.B. 277, Reg. Sess. (Va. 1996).

¹⁰ See Warren King, *Decisive Loss for 'Aid in Dying'*, SEATTLE TIMES, Nov. 6, 1991, at D1.

drafted the initiative, Kathryn L. Tucker, mobilized other right-to-die advocates for two momentous court challenges.¹¹ These lawsuits, brought in Washington¹² and New York,¹³ were part of a national strategy designed to compel the U.S. Supreme Court to review the constitutionality of laws forbidding physicians from assisting their patients' suicides.¹⁴ When the Court did so, it unsurprisingly held that the U.S. Constitution did not recognize a general right to physician-assisted suicide.¹⁵ However, the Court did not conclusively bar the possibility that in any *individual instance* of requested suicide assistance, such a right might exist. Instead, it explicitly left open the possibility that "a more particularized challenge" than that which the reformers had brought might succeed.¹⁶ Laurence H. Tribe, who argued the New York case before the Supreme Court, has described this loophole as having "the primary effect of leaving open for the future the drawing of all the difficult lines in this complicated and sensitive area. . . . The Court, far from slamming the door, in fact left it open."¹⁷

This Comment examines that "open door," which apparently invites future federal constitutional challenges.¹⁸ Part I offers a

¹¹ Thomas Maier, *Making a Case for Suicide Aid: For High Court. Historic Chance to Decide Issue of Right to Die*, *NEWSDAY*, Jan. 5, 1997, at A4.

¹² See *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D.Wash. 1994), *aff'd in part*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S.Ct. 2258 (1997).

¹³ See *Quill v. Koppel*, 870 F. Supp. 78 (S.D.N.Y. 1994), *rev'd in part sub nom.*, *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd in part*, 117 S. Ct. 2293 (1997).

¹⁴ William Carlsen, *When Patients Choose to Die: Seattle Group Gives Assisted Suicide Momentum in Courts*, *S.F. CHRON.*, June 3, 1996, at A1. The strategy was to have enough Circuit Courts of Appeal issue opinions on the issue that the Court would be forced to address their conflicting outcomes and/or legal approaches. *Id.*

¹⁵ See *Glucksberg*, 117 S. Ct. at 2275; *Quill*, 117 S.Ct. at 2301-02.

¹⁶ See *Glucksberg*, 117 S. Ct. at 2275 n.24; *Quill*, 117 S.Ct. 2293, 2302 n.13; see discussion, *supra*, Part III.A.

¹⁷ John Farrell, *No Absolute "Right to Die," Supreme Court Rules; Bans Upheld on Assisted Suicides; Issue is Left Open*, *BOSTON GLOBE*, June 27, 1997, at A1.

¹⁸ This Comment does not consider the assertion of such a right predicated on a state's constitution. State constitutional provisions can provide significantly more

general overview of the Washington and New York lawsuits, while Part II examines how the Supreme Court majority ultimately decided them. Part III analyzes the Court's concurring opinions which, jointly and as incorporated into the Court's holdings through two critical footnotes, apparently create the "open door." Part IV synthesizes the Court's various opinions, outlines a post-*Glucksberg* challenge to an assisted suicide statute, and examines a recent state court decision which might have been the first test of the "open door."

I. LOWER COURT DECISIONS

Several factors influenced the *Glucksberg* and *Quill* litigation. First, the national controversy would not have escalated as it had without the overwhelming public interest in Jack Kevorkian.¹⁹ Although neither Kevorkian himself,²⁰ nor his conduct,²¹ were

expansive protections than their federal counterpart, even if identically worded. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). To date, however, no state constitutional physician-assisted suicide challenge has succeeded. See *Kevorkian v. Arnett*, 939 F. Supp. 725, 731-32 (C.D. Cal. 1996); *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997); *State v. Kevorkian*, 447 Mich. 436 (1994); *Donaldson v. Lundgren*, 2 Cal. App. 4th 1614 (Cal. Ct. App. 1992).

¹⁹ In fact, terms like "right to die," "death with dignity," and "physician-assisted suicide" had generally been the jargon of academics and special interest groups until the media attention surrounding two 1990 events brought them into the national discourse: Janet Adkins's becoming the first to use Kevorkian's "suicide machine" on June 4, 1990, and the Supreme Court's decision in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (addressing the right to remove life support systems from a vegetative patient).

²⁰ The Supreme Court has twice declined to review cases to which Kevorkian was a party. See *Kevorkian v. Michigan*, 117 S. Ct. 296 (1996), *denying cert. to* 210 Mich. App. 601 (1995) (upholding injunction against suicide assistance); *Kevorkian v. Michigan*, 115 S. Ct. 1795 (1995), *denying cert. to* 447 Mich. 436 (1994) (upholding validity of state assisted suicide ban).

²¹ These cases challenged the constitutionality of laws prohibiting physicians from prescribing lethal medications to their mentally competent, terminally ill patients for them to self-ingest. See *Quill v. Vacco*, 870 F. Supp. 78, 79 (S.D.N.Y. 1994); *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1456 (W.D. Wash. 1994).

directly involved in this litigation, his shadow undeniably loomed over it, influencing the manner in which it was framed, and, perhaps, decided. The cases also concerned one of the few social issues more controversial than physician-assisted suicide itself: the Supreme Court's abortion jurisprudence, namely *Planned Parenthood v. Casey*.²² Finally, *Cruzan v. Director, Missouri Dept. of Health*,²³ the only Supreme Court "right to die" case at the reformers' disposal, set the backdrop against which the lower courts would have to grapple with the reformers' challenges.

A. The Due Process Challenge: *Compassion in Dying v. Washington*

1. The District Court's Opinion

*Compassion in Dying v. Washington*²⁴ challenged a Washington statute which made it a felony to "knowingly cause[] or aid[] another

Kevorkian, however, is no longer a licensed physician, *see Kevorkian v. Arnett*, 939 F. Supp. 725, 728 & n.1 (C.D. Cal. 1996); and usually assists the suicides of persons chronically rather than terminally ill. *See Thomas Maier, Waiting at Death's Door*, *NEWSDAY*, Sept. 8, 1996, at A50. Kevorkian employs syringes or oxygen masks connected to lethal agents rather than written prescriptions. *See generally*, JACK KEVORKIAN, *PRESCRIPTION MEDICIDE: THE GOODNESS OF PLANNED DEATH* (1991).

²² 505 U.S. 833 (1992). In *Casey*, the Supreme Court reviewed the constitutionality of a number of restrictions which a state statute placed on abortion. *See id.* at 844. A plurality composed of Justices O'Connor, Kennedy, and Souter reaffirmed what they described as the "essential holding" of *Roe v. Wade*, 410 U.S. 113 (1973). *Id.* at 846, 870-71.

²³ 497 U.S. 261 (1990). In *Cruzan*, the parents of a woman in a permanently vegetative state sought to remove the feeding tube which kept her alive. *Cruzan v. Director, Missouri Dept. of Health*, *Id.* at 267-68. Although the Supreme Court stated it would "assume" the existence of a constitutional right to avoid unwanted medical treatment, *id.* at 269, it ruled that a state's heightened evidentiary standard for assessing a patient's wishes did not violate that right. *Id.* at 280-83.

²⁴ 850 F. Supp. 1454 (W.D.Wash. 1994), *aff'd in part*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

person to attempt suicide.”²⁵ The plaintiffs included three mentally competent, terminally ill persons;²⁶ five physicians who regularly treated terminally ill patients;²⁷ and Compassion in Dying, a non-profit organization which provided counseling to terminal patients considering suicide.²⁸ The plaintiffs challenged the statute both facially and as applied to mentally competent adult patients with terminal illnesses choosing to voluntarily hasten their deaths with lethal doses of physician-prescribed medication.²⁹ The District Court ruled for the plaintiffs, invoking the assertion made in *Casey* that the Due Process clause protected “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy[.]”³⁰ The right of individuals with terminal illness to obtain assistance in suicide, the Court reasoned, was an intimate choice analogous to *Casey*’s right to terminate pregnancy and *Cruzan*’s right to refuse treatment.³¹

2. The Ninth Circuit’s Opinion

A divided three-judge panel reversed the District Court’s holding on appeal, criticizing its interpretation of *Casey* as

²⁵ WASH. REV. CODE ANN. § 9A.36.060 (1991). A conviction can result in five years imprisonment and \$10,000 fine. *Id.* §§ 9A.36.060(2), 9.20.020(1)(c) (1991).

²⁶ *Compassion*, 850 F. Supp. at 1456-57. The patients, respectively suffering from cancer, emphysema, and AIDS, averred that their diseases were incurable, that they experienced unrelenting pain, and that they wished to obtain physician-prescribed lethal medication in order to commit suicide. *Id.*

²⁷ *Id.* at 1457-58.

²⁸ *Id.* at 1458.

²⁹ The plaintiffs sought declaratory judgment regarding the statute’s invalidity and injunctive relief against its enforcement. *Id.* at 1456. They did not challenge the portion of the statute which forbid a person from “caus[ing]” a suicide. *Compassion in Dying v. Washington*, 79 F.3d 790, 797 (9th Cir. 1996) (en banc).

³⁰ *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994) (quoting *Casey*, 505 U.S. at 851).

³¹ *Id.* at 1459-62. The Court also ruled that the statute violated the Equal Protection Clause. *See id.* at 1466-67.

“inherently unstable”³² and its judgment as “unheard-of.”³³ The scathing opinion invoked several State interests, including preserving the integrity of the medical profession;³⁴ protecting patients from “psychological pressure to consent to their own deaths;”³⁵ preventing the exploitation of individuals who are poor and/or minorities;³⁶ and protecting individuals with disabilities from “societal indifference and apathy.”³⁷ The panel also identified the serious problems which have arisen in the Netherlands, the only nation in the world to have legalized physician-assisted suicide and euthanasia,³⁸ and concluded

³² *Compassion in Dying v. Washington*, 49 F.3d 586, 590 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

³³ *Id.* at 593.

³⁴ Or as the panel described it, “[t]he interest in not having physicians in the role of killers of their patients.” *Id.* at 592.

³⁵ *Id.*

³⁶ *Id.* Although there is little evidence that racial minorities would actually be exploited by physician-assisted suicide, African-Americans are significantly less likely to support its legalization than are members of other ethnic groups. See Harold G. Koenig et al., *Attitudes of Elderly Patients and Their Families Toward Physician-Assisted Suicide*, 156 ARCH. INT. MED. 2240-48 (1996); Panagiota V. Caralis et al., *The Influence of Ethnicity and Race on Attitudes Toward Advance Directives, Life-Prolonging Treatments, and Euthanasia*, 4 J. CLIN. ETHICS 155-65 (1993). While the reason for this disparity is unknown, it is apparently unrelated to any lack of trust in health care workers or in the health care system. E.D. McKinley et al., *Differences in End-of-Life Decision Making Among Black and White Ambulatory Cancer Patients*, 11 J. GEN. INT. MED. 651-56 (1996).

³⁷ *Compassion*, 49 F.3d at 592-93.

³⁸ Over the last twenty-five years, Dutch courts have tolerated euthanasia based on *noodtoestand*, a necessity defense. The rationale is that a physician stands with her “back against the wall” due to her conflicting duties—to obey the law and to relieve suffering. CARLOS GOMEZ, *REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS* 37-38 (1991). The defense was first identified in the case of *Leeuwarden*, *Nederlandse Jurisprudentie*, 1973, No. 183 (Neth.), *discussed in* *Euthanasia Case Leeuwarden-1973*, 3 ISS. L. & MED. 439 (Walter Lagerwey trans., 1988) and later by the nation’s highest court in *Schoonheim*, *Nederlandse Jurisprudentie*, 1984, No. 106 (Neth.), *discussed in* *Abstracts*, 3 ISS. L. & MED. 455, 461 (Walter Lagerwey trans., 1988).

that a State may validly act to prevent similar abuses in the United States.³⁹

3. The Ninth Circuit's *En Banc* Opinion

After rehearing the case *en banc* due to its "extraordinary importance,"⁴⁰ the Ninth Circuit reversed itself in an historic 8-3 decision.⁴¹ Judge Stephen Reinhardt, writing for the majority, framed the issue as "whether a person who is terminally ill has a constitutionally-protected liberty interest in hastening what might otherwise be a protracted, undignified, and extremely painful death."⁴² He observed that the common law condemnation of "self-murder" imposed significantly reduced penalties for suicides motivated by physical suffering,⁴³ and only about half of the states

³⁹ *Compassion*, 49 F.3d at 593. A delegation known as the Rummelink Commission has found that euthanasia accounts for approximately 2,300 deaths, or 1.8 % of all deaths, in the Netherlands annually. Henk A.M.J. ten Have & Jos V.M. Welie, *Euthanasia: Normal Medical Practice?*, HASTINGS CENTER REP., Mar./Apr. 1992, at 34. Assisted suicide was found to be "relatively uncommon" at 400 instances per year. *Id.* (These figures are somewhat small compared to the 9,000 annual requests for euthanasia. *Id.* at 34-35). However, the Commission also estimated that patients were euthanized without explicit request in approximately 1,000 instances per year. *Id.* at 35. The Commission nevertheless concluded that euthanasia practice was stable, workable, and properly managed. *Id.* at 34-35.

⁴⁰ *Compassion*, 79 F.3d at 798.

⁴¹ *Id.*

⁴² *Id.* at 793. He made clear that this broadly-framed inquiry was the appropriate one in light of the reasoning of *Roe v. Wade*, 410 U.S. 113. *Compassion*, 79 F.3d at 801. As Judge Reinhardt noted, the Texas statutes struck down in *Roe* did not directly prohibit abortion itself, but instead the act of "designedly administer[ing] to a pregnant woman . . . any drug or medicine [to] procure an abortion," *Roe*, 410 U.S. at 118—effectively, physician-assisted abortion.

⁴³ *Compassion*, 79 F.3d at 808-09 (citing Thomas J. Marzen, *Suicide: A Constitutional Right*, 24 DUQ. L. REV. 1, 58-59, 61 (1985)). While the usual penalty for suicide was forfeiture of real and personal property to the crown, persons moved to suicide by such suffering lost their personal property only. *Id.* (citing 2 H. DE BRACON ON LAWS AND CUSTOMS OF ENGLAND 423-24 (f.150) (c. 1250) (G. Woodbine ed., S. Thorne tr., 1968) and 3 EDWARD COKE, INSTITUTES OF

ratifying the Fourteenth Amendment in 1868 outlawed suicide.⁴⁴ Although today assisting a suicide is prohibited,⁴⁵ suicide and attempted suicide are no longer crimes in any state.⁴⁶ Judge Reinhardt also noted that no physician has ever been punished for assisting the suicide of a patient⁴⁷ despite studies that consistently reveal a “time-honored but hidden” practice of physician-assisted suicide.⁴⁸

Judge Reinhardt cited *Cruzan*, *Casey*, and *Roe* as examples of the flexibility of the Supreme Court’s “evolving doctrinal approach”⁴⁹ in substantive Due Process cases.⁵⁰ Theorizing that because the strength of the State’s interest in life increases as a fetus approaches

THE LAWS OF ENGLAND *54 (Garland Pub., Inc. 1979) (1628)).

⁴⁴ *Id.* at 809 & n.42 (citing Marzen, *supra* note 43, at 76).

⁴⁵ *Id.* at 810 (citing Julia Pugliese, Note, *Don’t Ask-Don’t Tell: The Secret Practice of Physician-Assisted Suicide*, 44 HASTINGS L.J. 1291, 1295 (1993)). Forty states prohibit assisted suicide by statute or common law. *See* Washington v. Glucksberg, 117 S.Ct. 2258, 2287 n.14 (1997) (Souter, J., concurring in judgment) (listing statutes); Commonwealth v. Mink, 123 Mass. 422, 428-29 (1877); People v. Kevorkian, 447 Mich. 436, 495 (1994); State v. Jones, 86 S.C. 17, 29-30 (1910); State v. Willis, 255 N.C. 473, 477 (1961). The criminal negligence statutes of two additional states are broad enough to reach the practice, *see* Ala. Code § 13A-6-1 (1994); Wyo. Stat. Ann. § 6-2-107 (Michie 1988), and four states plus the District of Columbia refer to it as a crime in other statutes, *see* D.C. Code Ann. § 6-2428(a) (1995); Idaho Code § 39-152 (1993); Nev. Rev. Stat. § 449.670 (1991); Utah Code Ann. § 75-2-1118 (1993); W.Va. Code § 16-30-10 (1995). Assisted suicide may be legal in the remaining four states. *See supra* note 9.

⁴⁶ *Compassion*, 79 F.3d at 810 (citing Marzen, *supra* note 43, at 85). Technically, suicide retains its common-law “criminal character” in over a dozen states despite the abolition of all penalties. *See, e.g.*, State v. Willis, 255 N.C. 473 (1961); May v. Pennell, 101 Me. 56 (1906). In 1976, Washington became the last state to repeal its statute prohibiting attempted suicide. *See* 1975 Wash. Laws, 1st Ex.Sess., ch. 260, § 9A.92.010 (eff. July 1, 1976), *repealing* WASH. REV. CODE § 9.80.020 (1961).

⁴⁷ *Compassion*, 79 F.3d at 811.

⁴⁸ *Id.* (citing Pugliese, *supra* note 45, at 1295).

⁴⁹ *Id.* at 803-04 (citing *Casey*, 505 U.S. 833, 848, citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

⁵⁰ *Id.* at 803-06.

viability, it must decrease as a person's life approaches its end,⁵¹ he found that the State's interests in preserving life and preventing suicide were only minimally implicated with regard to individuals with terminal illnesses.⁵² He also found that a physician's complicity in a patient's suicide was difficult to distinguish from a form of care for the dying known as "terminal sedation," in which doctors administer medications with the intention of alleviating their patients' intense pain but with the knowledge that they might also hasten death.⁵³ Dismissing the State's remaining interests as meriting no greater weight than in the treatment-refusal or abortion contexts,⁵⁴ Judge Reinhardt found them outweighed by the Due Process interests of individuals with terminal illnesses.⁵⁵

B. The Equal Protection Challenge: *Quill v. Vacco*

1. The District Court's Opinion

*Quill v. Koppel*⁵⁶ challenged two New York statutes which respectively prohibited "intentionally caus[ing] or aid[ing] a suicide" resulting in death⁵⁷ and "promoting" an unsuccessful suicide

⁵¹ *Id.* at 800-01 n.13, 836-37.

⁵² *Id.* at 816-24; accord *Saikewicz v. Belchertown*, 370 N.E. 2d 417, 426 n.11 (1977).

⁵³ *Compassion*, 79 F.3d at 823. Usually, though not always, doctors prescribe such medication with their patients' consent. See Thomas A. Preston, *Physician Involvement in Life-Ending Practices*, 18 PUGET SOUND. L. REV. 531, 539 (1995). This "double effect" is both legal and ethical. See Council on Ethical and Judicial Affairs, American Medical Association, *Decisions Near the End of Life*, 267 JAMA 2229 (1992).

⁵⁴ *Compassion*, 79 F.3d at 825-32.

⁵⁵ *Id.* at 836-37. The Court, therefore, did not reach the Equal Protection issue. *Id.* at 838 n.138.

⁵⁶ 870 F. Supp. 78 (S.D.N.Y. 1994), *rev'd in part sub nom.*, *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd in part*, 117 S. Ct. 2293 (1997).

⁵⁷ N.Y. Penal Law § 125.15(3) (McKinney 1994). A conviction can result in a fine of \$5,000 and fifteen years imprisonment. *Id.* §§ 70.00(2)(c), 80.00(1)(a).

attempt.⁵⁸ The plaintiffs included three mentally competent adults in the final stages of terminal illnesses⁵⁹ and three physicians who alleged that, in certain circumstances, honoring patient requests to hasten death was consistent with ethical standards.⁶⁰ The plaintiffs' Equal Protection and Due Process claims were virtually identical to those asserted in the Washington litigation.⁶¹ The District Court applied a "history and tradition" test⁶² and concluded that the historical rejection of assisted suicide as either legally sanctioned or morally acceptable precluded the Due Process claim.⁶³ The Court also rejected the plaintiffs' Equal Protection argument, ruling that intentionally bringing about the death of a patient rationally differs from merely allowing a patient to die from withdrawal of treatment.⁶⁴

2. The Second Circuit's Opinion

On appeal, Judge Roger Miner agreed with the District Court that it would be inappropriate to recognize a right to assisted suicide given that it was not deeply rooted in the nation's history and

⁵⁸ N.Y. Penal Law § 120.30 (McKinney 1994). A conviction can result in a fine of \$5,000 and four years imprisonment. *Id.* §§ 70.00(2)(e), 80.00(1)(a). The *Quill* plaintiffs did not challenge provisions allowing a person who "causes or aids [a] suicide attempt by the use of duress or deception" to be prosecuted for murder under § 120.35 or second-degree murder under § 125.25(1)(b).

⁵⁹ *Quill v. Vacco*, 80 F.3d 716, 719 (2d Cir. 1996). One plaintiff suffered from thyroid cancer while the other two had AIDS.

⁶⁰ *Quill*, 870 F. Supp. at 80.

⁶¹ A notable exception is that their challenges were merely as-applied in nature, rather than both as-applied and facial as had been the claims in *Compassion*. Compare *Quill*, 80 F.3d at 719 with *Compassion*, 79 F.3d at 797.

⁶² *Quill v. Koppell*, 870 F. Supp. 78, 83-84 (S.D.N.Y. 1994). Under this formulation, the Due Process Clause recognizes rights "deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

⁶³ *Quill*, 870 F. Supp. at 84.

⁶⁴ *Id.* at 84-85.

tradition.⁶⁵ Turning to the Equal Protection challenge, he compared New York's assisted suicide statutes to the State's policy on refusing medical treatment.⁶⁶ He found that because New York recognizes the right to withdraw life support,⁶⁷ it did not treat similarly-situated persons alike: patients in the final stages of terminal illness who happen to be on life-support systems may legally hasten their deaths by refusing treatment, while other terminal patients are barred from doing the same by self-administering prescribed drugs.⁶⁸

Judge Miner rejected the "natural versus unnatural death" distinction, which the State invoked in the statutes' defense, on the ground that withdrawal of treatment induced death not by the underlying illness, but rather by starvation, dehydration, and/or respiratory failure.⁶⁹ Similarly, he rejected the "action-inaction distinction" on the ground that a physician's complicity in removing a respirator or other life-sustaining device involved significantly more "action" than did writing a prescription, including physically removing the equipment and administering palliative drugs which themselves often contribute to the patient's death.⁷⁰ Relying on

⁶⁵ *Quill*, 80 F.3d at 724-25.

⁶⁶ *Id.* at 727-29.

⁶⁷ *Id.* at 727 (citing *In re Eichner*, 52 N.Y.2d 363 (1981) and *In re Storar*, 52 N.Y.2d 363 (1981)). See also N.Y. PUB. HEALTH LAW § 2803-c (McKinney 1994), which declares the right to refuse treatment as "the public policy of the state."

⁶⁸ *Quill*, 80 F.3d at 729.

⁶⁹ *Id.* Accord Compassion in Dying v. Washington, 79 F.3d 790, 822 n.91 (9th Cir. 1996) (*en banc*) ("[I]t was the discontinuance of the provision of food and water, not Cruzan's accident almost eight years earlier, that caused her death.").

⁷⁰ *Id.* at 729. Judge Miner found support for his conclusion in Justice Scalia's rejection of the action-inaction distinction in *Cruzan*: "Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious decision to 'pu[t] an end to his own existence.'" *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 296-97 (1990) (Scalia, J., concurring) (internal citation omitted). Justice Scalia, of course, was arguing that a right to *neither* act should be sanctioned. See *id.*

Casey,⁷¹ Judge Miner queried:

[W]hat interest can the state possibly have in requiring the prolongation of a life that is all but ended? And what business is it of the state to require the continuation of agony when the result is imminent and inevitable? The greatly reduced interest of the state in preserving life compels the answer to these questions: "None."⁷²

The Court held that the statutes served no rational relation to legitimate purposes and hence violated the Equal Protection Clause.⁷³

II. THE SUPREME COURT: MAJORITY DECISIONS

The Supreme Court granted certiorari to both cases to be heard in tandem.⁷⁴ Chief Justice Rehnquist, author of *Cruzan* and lead dissenter in *Casey*, wrote the majority opinions in which Justices Kennedy, Thomas, Scalia, and O'Connor joined.

A. *Washington v. Glucksberg*⁷⁵

Chief Justice Rehnquist began his review of the Ninth Circuit's ruling by noting that the American colonies adopted the common-law condemnation of suicide and treated "counsel[ing] another to commit

⁷¹ *Quill*, 80 F.3d at 730 (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)).

⁷² *Quill*, 80 F.3d. at 729-30 (internal citations omitted).

⁷³ *Id.* at 731.

⁷⁴ See *Vacco v. Quill*, 117 S. Ct. 36 (1996); *Washington v. Glucksberg*, 117 S. Ct. 37 (1996).

⁷⁵ The non-profit organization *Compassion in Dying* was no longer a party to the litigation because it failed to brief its claims in the trial court. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1467 (W.D. Wash. 1994); Brief for the Petitioners, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (No. 96-110).

suicide” as murder⁷⁶ without exception for persons who were already near death due to illness or scheduled execution.⁷⁷ In recent years, he observed, the States’ assisted suicide bans have generally been reaffirmed by voters and legislatures;⁷⁸ although legalization bills have been introduced in several state legislatures (including those of Washington and New York⁷⁹), none have been enacted.⁸⁰

Chief Justice Rehnquist went on to describe the Court’s approach in analyzing Due Process challenges as involving two primary features: an examination of the nation’s history and tradition, and a “careful description” of the asserted fundamental liberty interest.⁸¹ Under this inquiry, he rejected the level of abstraction with which the Ninth Circuit had framed the issue.⁸² He characterized it instead as “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so,”⁸³ citing a decision of the

⁷⁶ *Washington v. Glucksberg*, 117 S.Ct. 2258, 2264 (1997) (quoting 2 Z. SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 270 (1823)).

⁷⁷ *Id.* at 2265 (citing *Blackburn v. State*, 23 Ohio St. 146, 163 (1872), *overruled on other grounds*, *State v. Staten*, 18 Ohio St. 2d 13 (1969); *Commonwealth v. Bowen*, 13 Mass. 356, 360 (1816)).

⁷⁸ *Id.* at 2265-67. He also mentioned the failed attempt to legalize the physician-assisted suicide in Washington by initiative. *See id.* at 2266; *see also supra* note 10.

⁷⁹ *See* Wash. S.B. 5596, 54th Legis., Reg. Sess. (1995); N.Y.S.B. 1683, 218th Gen. Assem., 1st Reg. Sess. (1995); N.Y.A.B. 6333, 219th Gen. Assem., 2d Reg. Sess. (1995); N.Y.S.B. 5024-A, 219th Gen. Assem., 2d Reg. Sess. (1995).

⁸⁰ *Glucksberg*, 117 S. Ct. at 2266.

⁸¹ *Id.* at 2268. This latter feature has never before been presented with such force. The three cases Chief Justice Rehnquist cited for this newly-articulated requirement involved the more familiar admonition against judicial “activism.” *See Reno v. Flores*, 507 U.S. 292, 302 (1993); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 277-78 (1990). He employed this standard in *Glucksberg* in a much more literal sense by relying upon it in defining the level of abstraction of the Court’s inquiry, *see Glucksberg*, 117 S. Ct. at 2269, unlike any prior decision.

⁸² *See* text accompanying *supra* note 42.

⁸³ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2269 (1997). At oral argument, Chief Justice Rehnquist had interrupted Kathryn Tucker during her introduction to emphasize that the issue before the Court was not one of “choice,” as she had

Michigan Supreme Court upholding criminal charges against Jack Kevorkian and framing its inquiry in virtually identical terms.⁸⁴

The Chief Justice explained that the rights recognized in *Cruzan* and *Casey* were based not on abstract notions of personal autonomy but rather on analyses of their own historical precursors.⁸⁵ Thus, *Cruzan* merely respected the privilege against forced medical treatment based on common-law battery,⁸⁶ while *Casey*'s "intimate and personal choices" passage was no more than a general description of the familiar history-and-traditions standard.⁸⁷ Because physician-assisted suicide "may be just as personal and profound as the decision to refuse unwanted medical treatment, but . . . has never enjoyed

characterized it, but rather of assistance to suicide, because no state bars people from committing suicide on their own. See Transcript of Oral Argument, *Washington v. Glucksberg*, 1997 WL 13671, *27 (Jan. 8, 1997) (No. 96-110).

⁸⁴ *Glucksberg*, 117 S. Ct. at 2269 n.18. The Michigan Supreme Court had rejected an inquiry similar to Judge Reinhardt's, preferring "whether the constitution encompasses a right to commit suicide and, if so, whether it includes a right to assistance." *People v. Kevorkian*, 447 Mich. 436, 476 n.47 (1994). Compare *id.* at 517 (Levin, J., concurring in part and dissenting in part) ("By framing the question in this manner, the lead opinion foreordains the answer. . . . The real issue is not whether the state can generally prohibit suicide [but] whether the state may deny a competent, terminally ill person, facing imminent, agonizing death, medical assistance to commit suicide.").

⁸⁵ *Glucksberg*, 117 S. Ct. at 2269-71.

⁸⁶ *Id.* at 2270.

⁸⁷ *Id.* at 2271. Reducing *Casey*'s autonomy analysis to the familiar history-and-tradition test significantly affects the relevance of the decision as it was understood when issued and as it will no doubt be interpreted in the future. See, e.g., Ronald Dworkin, *The Center Holds!*, N.Y. REV. OF BOOKS, Aug. 13, 1992, at 29 ("[*Casey*] may prove to be one of the most important Court decisions of this generation . . . because three key justices [O'Connor, Kennedy, and Souter] . . . reaffirmed a more general view of the nature of the Constitution which they had been appointed to help destroy"); *Seeley v. Washington*, 940 P.2d 604, 627 (Wash. 1997) (Sanders, J., dissenting) ("Were we to restrict *Roe* and *Casey* to a specific narrow holding on abortion we would rob these decisions of their claimed basis in the fundamental principles inherent in substantive due process."). Justice O'Connor's concurrence with the majority opinion in *Glucksberg* is telling of either her own interpretation of *Casey* or her unwillingness to defend it.

similar legal protection,”⁸⁸ he concluded that rational basis scrutiny was appropriate.⁸⁹

Chief Justice Rehnquist disagreed with the contention that the State’s interest in life declines as the patient nears death, noting that a State may decline to make judgments about the patient’s “quality of life.”⁹⁰ Because the legalization of physician-assisted suicide could also make it more difficult for the State to identify patients whose suicidal impulses were motivated by depression or mental illness, he reasoned that a generalized ban on all assisted suicide is a rational method of protecting them.⁹¹ He went on to recognize the State’s interests in protecting both the integrity of the medical profession⁹² and vulnerable groups such as individuals who are poor, elderly, or have disabilities from resorting to suicide to spare their families the financial costs of end-of-life care.⁹³ He identified the State’s rational

⁸⁸ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2270 (1997).

⁸⁹ *Id.* at 2271.

⁹⁰ *Id.* at 2272 (citing *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 282 (1990)).

⁹¹ *Id.* at 2273.

⁹² *Id.* at 2273-74 (citing AMERICAN MEDICAL ASSOCIATION, CODE OF ETHICS § 2.211 (1994)). Many commentators have argued that fostering an open, unfettered physician-patient relationship in which the terminally ill may speak candidly with their doctors about their available options, including physician-assisted suicide, is crucial to the integrity and respectfulness the medical profession deserves. *See, e.g.,* RUSSEL D. OGDEN, EUTHANASIA, ASSISTED SUICIDE, AND AIDS 190 (1994). *Accord* AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS, Opinion 2.20, at 40 (1996) (“Physicians have an obligation to relieve pain and suffering and to promote the dignity and autonomy of dying patients in their care.”).

⁹³ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2273 (1997). Perhaps tellingly, the less affluent a person is, the less likely she is to favor the legalization of physician-assisted suicide. *See* Mark Clements & Dianne Hales, *How Healthy Are We?*, *PARADE*, Sept. 7, 1997, at 6 (finding legalization favored by 76% of survey respondents earning \$75,000 per year and over but only 59% earning under \$25,000 per year). The same survey reported that persons age 65 and over were also less like to support legalization. *Id.* (53%, compared to 69% of those aged 18 to 34); *see also* Harold G. Koenig et al., *Attitudes of Elderly Patients and Their Families Toward Physician-Assisted Suicide*, 156 *ARCH. INT. MED.* 2240-48 (1996)

fear of the “slippery slope” and cited euthanasia in the Netherlands as an example, arguing that legalization there had “not been limited to competent, adults with terminally illness, who are enduring physical suffering.”⁹⁴ Chief Justice Rehnquist ultimately rejected the plaintiffs’ challenges, finding it unnecessary to weigh the State’s “unquestionably important” interests to which the statute was “at least reasonably related.”⁹⁵

B. *Vacco v. Quill*

Turning to the Second Circuit’s holding, Chief Justice Rehnquist observed that neither New York’s statutes banning assisted suicide nor its statutes permitting refusal of medical treatment appear on their faces to distinguish between persons: no one may assist suicide, yet anyone may refuse treatment.⁹⁶ Rejecting the disparity that they purportedly created, he found the State’s action-inaction

(elderly patients more likely than their families to oppose physician-assisted suicide).

⁹⁴ Glucksberg, 117 S. Ct. at 2274. Of course, far from resulting from some downward progression, the Dutch judiciary’s tolerance of euthanasia had at no time purported to be so limited. Euthanasia in the Netherlands is not a right of the patient but rather a duty of the doctor, *see supra* note 38, and the Dutch courts have never significantly expanded the rationale beyond its (admittedly broad) original formulation. *See, e.g., Doctor Given Suspended Sentence For Ending Life of Coma Patient*, ANP ENG. NEWS BULL., Oct. 26, 1995 (defense inapplicable to doctor who failed to consult another physician and who received request only from the patient’s children); *Dutch Doctor Fined For Breaching Euthanasia Rules*, Reuters World Service, May 11, 1995 (defense inapplicable to doctor who failed to consult another physician and inaccurately reported cause of death); *Dutch Nurse Sentenced in Euthanasia Test Case*, Reuters World Service, Mar. 23, 1995 (defense inapplicable to nurse acting under physician’s supervision).

⁹⁵ Glucksberg, 117 S. Ct. at 2275. The words he selected are significant because they correlate with the terminology used in articulating the Court’s “intermediate scrutiny” standard, *see, e.g., J.E.B. v. Alabama*, 511 U.S. 127 (1994), suggesting Chief Justice Rehnquist would have upheld the assisted suicide ban even under heightened scrutiny.

⁹⁶ *Vacco v. Quill*, 117 S. Ct. 2293, 2297-98 (1997).

distinction “important and logical; it is certainly rational.”⁹⁷ He regarded this dichotomy as one of the law’s long-recognized tools for distinguishing between two actions which may have the same result, citing dicta in *Cruzan*⁹⁸ and even state statutes permitting one but not the other (the validity of which the Court was, to some degree, reviewing).⁹⁹

Chief Justice Rehnquist found that the action-inaction distinction applied to principles of both causation and intent.¹⁰⁰ First, he believed, the withdrawal of life-sustaining medical treatment results in death caused by the underlying illness whereas the ingestion of physician-prescribed lethal medication itself causes the death.¹⁰¹ Second, he remarked that a physician who agrees to withdraw a patient’s life-sustaining treatment may merely intend to “respect his patient’s wishes,”¹⁰² whereas a physician who writes a lethal prescription to assist a patient’s suicide “must, necessarily and

⁹⁷ *Id.* at 2298; *see also id.* at 2302 (describing the State’s interests as “important”); *id.* at 2302 n.12 (referring to “the reasonableness of the distinction”). As had his terminology in the *Glucksberg* Due Process analysis, Chief Justice Rehnquist’s choice of words suggests he would have found the State’s interests sufficient to satisfy even an intermediate scrutiny standard. *See supra* note 95. At oral argument (but not in his brief) Laurence Tribe actually conceded that the action/inaction distinction “isn’t quite irrational” but rather that, in the context of physician-assisted suicide, the distinction “operates irrationally.” Transcript of Oral Argument, *Vacco v. Quill*, 1997 WL 13672, *37 (Jan. 8, 1997) (No. 96-1858).

⁹⁸ *Quill*, 117 S.Ct. at 2301 (citing *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 280 (1990) (noting that “the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide.”)).

⁹⁹ *Id.* at 2299-2301 (citing N.Y. Pub. Health Law § 2989(3) (McKinney 1994) (“This article is not intended to permit or promote suicide, assisted suicide, or euthanasia.”)).

¹⁰⁰ *Id.* at 2298.

¹⁰¹ *Id.* The opinion did not address Judge Miner’s observation for the Second Circuit that merely writing a prescription involves much less action than “pulling the plug” which itself causes death by starvation, dehydration, and/or suffocation rather than the patient’s own illness. *See supra* text accompanying notes 69 and 70.

¹⁰² *Vacco v. Quill*, 117 S.Ct. 2293, 2298 (1997).

indubitably, intend primarily that the patient be made dead.”¹⁰³ He also accepted the “double effect” rationale behind the legal practice of aggressive pain treatment known as terminal sedation with the “foreseen but unintended” consequence of hastened death.¹⁰⁴ Likewise, the intent of the *patient* may differ as well—while suicide is, by definition, motivated by the intent to kill one’s self, a patient who refuses life-sustaining treatment may wish to live but find the necessary medical treatment repugnant.¹⁰⁵ Chief Justice Rehnquist concluded that the same State interests discussed in the *Glucksberg* opinion supported the validity of New York’s ban.¹⁰⁶

III. AN OPEN DOOR? THE CONCURRENCES

A. Footnotes Twenty-Four and Thirteen

Chief Justice Rehnquist’s opinion for five members of the Court certainly appeared a decisive defeat for the challengers. Both the Due Process and Equal Protection challenges were rejected unanimously, and the precedential value of *Cruzan* and *Casey* was significantly narrowed.¹⁰⁷ Moreover, under a revamped formula for framing

¹⁰³ *Id.* at 2299 (internal citation omitted). The Chief Justice’s strong language on this latter point would appear to ignore that the lead plaintiff in the case before him, Dr. Timothy Quill, had written just such a prescription for one of his leukemia patients sincerely hoping that she would not use it. *See* TIMOTHY E. QUILL, DEATH AND DIGNITY: MAKING CHOICES AND TAKING CHARGE 12-15 (1993).

¹⁰⁴ *Id.* at 2301-02.

¹⁰⁵ *Id.* at 2299. It should be noted that courts routinely uphold the right to withdraw life-sustaining treatment in patients who wish to do so with the express purpose of bringing about their deaths. *See, e.g.,* DeGrella v. Elston, 858 S.W.2d 698 (Ky. 1993); Thor v. Superior Court of Solano, 5 Cal.4th 725 (1993); McKay v. Bergstedt, 106 Nev. 808 (1990); State v. McAfee, 259 Ga. 579 (1989); Bouvia v. Superior Court, 179 Cal. App. 3d 1127 (1986).

¹⁰⁶ *Id.* at 2302.

¹⁰⁷ *See supra* text accompanying notes 85-87. This result may have been predictable, given the plaintiffs’ dilemma in this litigation: legal precedents did seem to support their argument (witness the language of *Casey* and the approach of *Cruzan*), while a variety of highly-visible current events (such as the activities

judicial inquiry in Due Process cases,¹⁰⁸ the Court implied that assisted-suicide statutes would satisfy even heightened scrutiny.¹⁰⁹ Nevertheless, in two extrusive footnotes which may potentially incite decades of new constitutional challenges, Chief Justice Rehnquist did leave an apparently “open door.”

In a concurring opinion, Justice Stevens had indicated that he did not “foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge.”¹¹⁰ In footnote 24, casually appended to the last paragraph of the *Glucksberg* majority opinion, Chief Justice Rehnquist apparently agreed, citing Justice Stevens’ comments and stating, “[o]ur opinion does not absolutely foreclose such a claim.”¹¹¹ He further qualified the reluctant concession: “[h]owever, given our holding that the Due Process Clause of the Fourteenth Amendment does not provide heightened protection to the asserted liberty interest in ending one’s life with a physician’s assistance, such a claim would have to be quite different from the ones advanced by respondents here.”¹¹² A similar footnote appeared at the end of the *Quill* majority opinion.¹¹³ Footnote 13 described as “true” Justice Stevens’s observation that the Court’s holding might not apply to every possible application of the statute¹¹⁴ but again explained that a future plaintiff challenging a state ban “in his particular case would need to present different and considerably stronger arguments” than did these plaintiffs.¹¹⁵ Justice Stevens

of Jack Kevorkian and clashes over abortion rights) were certain to arouse the Justices’ anxieties.

¹⁰⁸ See *supra* note 81 and accompanying text.

¹⁰⁹ See *supra* notes 95, 97 and accompanying text.

¹¹⁰ *Washington v. Glucksberg*, 117 S. Ct. 2302, 2309 (1997) (Stevens, J. concurring in judgments).

¹¹¹ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 n.24 (1997).

¹¹² *Id.*

¹¹³ *Vacco v. Quill*, 117 S. Ct. 2293, 2302 n.13 (1997).

¹¹⁴ *Glucksberg*, 117 S. Ct. at 2310 (Stevens, J., concurring in judgments).

¹¹⁵ *Quill*, 117 S. Ct. at 2302 n.13.

implicitly acknowledged that a majority of the Court had adopted his sentiments when he remarked that “[f]uture cases will determine whether such a challenge may succeed.”¹¹⁶

B. The Concurring Opinions

Four Justices agreed that the plaintiffs’ facial and as-applied constitutional challenges in both cases must fail, but for reasons entirely separate from those set forth in the majority’s opinions.¹¹⁷ In addition, Justice O’Connor, the crucial fifth vote which Chief Justice Rehnquist needed in order to avoid a fractured disposition,¹¹⁸ joined the majority’s opinions but not without filing a concurrence.¹¹⁹ Her separate opinion necessarily affects the proper reading of the Court’s holdings.¹²⁰

¹¹⁶ *Glucksberg*, 117 S. Ct. at 2309.

¹¹⁷ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275-93 (Souter, J., concurring in the judgment); *Quill*, 117 S. Ct. at 2302 (Souter J., concurring in judgments); *Glucksberg*, 117 S. Ct. at 2304-10 (Stevens, J., concurring in judgments); *id.* at 2310 (Ginsburg, J., concurring in judgments); *id.* at 2310-12 (Breyer, J., concurring in judgments). By “concurring in judgment,” a Justice agrees with the majority opinion’s ultimate outcome but dissents from its legal rationale. Igor Kirman, *Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2089 (1995).

¹¹⁸ Chief Justice Rehnquist may have been concerned with the sheer number of federal judges who had found a “right to die.” As compared with the nine members of his own court, 15 of 20 federal judges on six courts to have considered the issue within three years identified some constitutionally-protected interest in physician-assisted suicide. See *supra* discussion Parts I.A and I.B; *Compassion in Dying v. Washington*, 79 F.3d 790, 850 (9th Cir. 1996) (en banc) (Beezer, J., dissenting); *Kevorkian v. Arnett*, 939 F. Supp. 725 (C.D.Cal. 1996). Footnotes 24 and 13 were almost certainly designed to persuade his colleagues to form a unanimous reversal of the lower decisions and a five-strong pronouncement of the justifications for the assisted suicide ban.

¹¹⁹ *Washington v. Glucksberg*, 117 S. Ct. 2302, 2303 (1997) (O’Connor, J., concurring).

¹²⁰ For example, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), Justice Powell signed the five-member majority opinion but also wrote a short concurrence invoking a more limited approach than the principal opinion. See *id.* at 709

1. Justice Stevens' Opinion

Justice Stevens concurred in the majority's judgment but wrote separately to emphasize that the Court's holdings left open the possibility that the Constitution may place limits on States' power to punish assisted suicide.¹²¹ While he agreed with the majority's conclusion that history and tradition provided a sufficient basis for ruling against "an open ended right to commit suicide,"¹²² he invoked the Court's capital punishment jurisprudence as an example of the possibility that statutes may be valid generally and yet unconstitutional in certain applications.¹²³ Justice Stevens reasoned that when a State has authorized the death penalty (such as Washington or New York¹²⁴), it acknowledges that the sanctity of life does not invariably require that life be preserved in all cases and thus concedes the legitimacy of situations in which hastening death is permissible.¹²⁵

(Powell, J., concurring). Most lower courts, noting that his vote was necessary for a majority, have employed Justice Powell's approach in applying *Branzburg*. See, e.g., *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708, 715-16 (3d Cir. 1979).

¹²¹ *Glucksberg*, 117 S. Ct. at 2304 (Stevens, J., concurring in judgments).

¹²² *Id.* at 2305.

¹²³ *Id.* at 2304 & n.4 (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989) (blocking execution when jury had not been instructed that it could consider defendant's mental retardation as a mitigating factor); *Enmund v. Florida*, 458 U.S. 782 (1982) (declaring unconstitutionally excessive execution of mere driver of get-away car); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (forbidding execution under statute which state courts had interpreted with capricious over-breadth to include the defendant's crime)). Justice Stevens had joined the lead opinion in each of these cases.

¹²⁴ See N.Y. CORRECT. LAW §§ 650-662 (McKinney 1994); WASH. REV. CODE §§ 10.95.010-.900 (1996).

¹²⁵ *Washington v. Glucksberg*, 117 S.Ct. 2302, 2305 (1997) (Stevens, J., concurring in judgments). The Court has never explicitly described its capital punishment jurisprudence in precisely these terms, but some Justices have arguably gone even further by referring to a state's "interest" in executing certain criminals. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (Powell, J., concurring in

Justice Stevens, who had dissented in *Cruzan*,¹²⁶ disagreed that the liberty interest in refusing medical treatment was based solely in the common law. Instead, he believed that the right, like all others protected by the Due Process Clause, derived from a more basic concept of freedom older than the Constitution and even the common law itself¹²⁷—the fundamental right to make deeply personal decisions.¹²⁸ That interest, he believed, was even stronger for the patients bringing the *Compassion* and *Quill* lawsuits than for Nancy Beth Cruzan because, unlike a vegetative patient, these plaintiffs suffered severe and constant pain.¹²⁹ Justice Stevens believed that avoiding living out one's final days in excruciating pain and indignity certainly fell within the "heart of liberty" recognized in the "personal choices" passage from *Casey*.¹³⁰ The State's interest in preserving life does not have the same force in all cases, he explained, as this interest is not a collective interest but rather an element of the individual's liberty.¹³¹ Although the State need not judge an individual's quality

part and concurring in judgment) ("in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime"); see also *Coleman v. Balkcom*, 451 U.S. 949, 950 (1981) (Stevens, J., concurring in denial of certiorari) (describing "the interest in imposing the death sentence" as "a state interest").

¹²⁶ See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 343 (1990) (Stevens, J. dissenting) ("Choices about death touch the core of liberty. . . . Not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience.").

¹²⁷ *Glucksberg*, 117 S. Ct. at 2306 & n.10. For more on Justice Stevens's dynamic view of fundamental liberties, see John Paul Stevens, *A Bicentennial Celebration of the Constitution: The Third Circuit Judicial Conference in Philadelphia*, 49 U. PITT. L. REV. 723 (1988) and *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277 (1986).

¹²⁸ *Glucksberg*, 117 S. Ct. at 2307 (citing *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 289 (1990) (O'Connor, J. concurring)).

¹²⁹ *Id.*

¹³⁰ *Id.* (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)).

¹³¹ *Id.* at 2307-08.

of life, permitting the individual to do so herself properly recognizes that liberty.¹³²

Justice Stevens pointed out that “the State’s legitimate interest in preventing abuse does not apply to an individual who is not victimized by abuse, who is not suffering from depression, and who makes a rational and voluntary decision to seek assistance in dying.”¹³³ Likewise, it is generally undisputed that at least some pain and suffering cannot be alleviated with any available palliative treatment.¹³⁴ He also found the State’s interest in the integrity of medicine was not implicated in a situation in which a physician’s refusal to hasten the death of an individual patient might cause the patient to feel abandoned in a time of need and might itself be inconsistent with the healing role.¹³⁵

Justice Stevens also agreed with the majority on the Equal Protection issue that the distinction between permitting death to result from an underlying affliction and causing it to occur with a lethal device constituted an adequately rational basis for addressing the disparity the statutes at issue create.¹³⁶ Nevertheless, he reiterated that

¹³² *Id.* at 2308.

¹³³ *Glucksberg*, 117 S. Ct. at 2308.

¹³⁴ *Id.* (citing David Orentlicher, *Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 B.C.L. REV. 443, 454 (1997) (“Greater use of palliative care would reduce the demand for assisted suicide, but it will not eliminate the demand.”)); see also Robert J. Miller, *Hospice Care as an Alternative to Euthanasia*, 20 L. MED. & HEALTH CARE 127, 128 (1992); Kathleen M. Foley, *The Relationship of Pain and Symptom Management to Patient Requests for Physician-Assisted Suicide*, 6 J. PAIN & SYMPTOM MGMT. 289 (1991) (as much as 10% of patient pain is untreatable).

¹³⁵ *Washington v. Glucksberg*, 117 S. Ct. at 2309 (1997) (Stevens, J., concurring in judgments).

¹³⁶ *Id.* at 2309-10. Rather than relying on the common law as had the majority, Justice Stevens cited the American Medical Association’s support for patient rights to withhold treatment but opposition to patient rights to assisted suicide. See Brief of the American Medical Association, et al., *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 95-1858); Brief of the American Medical Association, et al., *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261 (1990) (No. 88-1503).

in specific situations there may be no differences between the intentions of the patients, physicians, or families involved and, in such cases, the State's refusal to permit the patient to hasten her death might impose an intolerable intrusion on her freedom.¹³⁷ The removal of a life support system can occur with both the requesting patient's and the complying physician's intent to hasten death;¹³⁸ similarly, a physician prescribing lethal doses of medication may intend not to induce death but only to ease the patient's suffering and obey her wishes.¹³⁹

Justice Stevens also cited terminal sedation, which is both legal and medically ethical, as further evidence of the "illusory character of any differences in intent or causation" between practices which are currently legal and physician-assisted suicide.¹⁴⁰ The purpose of terminal sedation, he reasoned, is to honor the patient's wishes and relieve her suffering, while the actual cause of death is the physician's administration of massive doses of palliative medications.¹⁴¹ A physician's complicity in her patient's suicide may involve the identical intent and causation.¹⁴² Thus, he concluded, while mentally competent adults with terminally illness do not have a right to physician-assisted suicide as a class, such persons may enjoy that right individually, depending upon their own circumstances.¹⁴³

¹³⁷ *Glucksberg*, 117 S. Ct. at 2309-10.

¹³⁸ *Id.* at 2310. Justice Stevens remarked, "[a] doctor who fails to administer medical treatment to one who is dying from a disease could be doing so with an intent to harm or kill that patient."

¹³⁹ *Id.* He also suggested that physicians may intend only to provide their patients with a sense of control over the dying process, given that many patients securing lethal prescriptions do not ever take them. *Id.* at 2310 n.15. Justice Stevens's reasoning here is effective in drawing a line between physician-assisted suicide and active euthanasia.

¹⁴⁰ *Id.* at 2310.

¹⁴¹ *Id.*

¹⁴² *Glucksberg*, 117 S. Ct. at 2310.

¹⁴³ *Id.*

2. Justice Souter's Opinion

Justice Souter also concurred in the Court's judgments.¹⁴⁴ His analysis differed from the majority's, however, in that he did not believe that the challenged statutes amounted to the "arbitrary impositions" or "purposeless restraints" of which the second Justice Harlan spoke in his famous *Poe v. Ullman*¹⁴⁵ dissenting opinion:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints[.]¹⁴⁶

Although he believed that the individual interest "cannot be gainsaid,"¹⁴⁷ Justice Souter found that the States' slippery slope concerns were sufficient to defeat the claim that the statutes banning assisted suicide were arbitrary or purposeless.¹⁴⁸

¹⁴⁴ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997) (Souter, J., concurring in judgment); *Vacco v. Quill*, 117 S. Ct. 2293, 2302 (1997) (Souter, J. concurring in judgment).

¹⁴⁵ 367 U.S. 497 (1961). Other cases in which Justice Souter's analysis has differed from that of the majority by relying on Justice Harlan's *Poe* dissent include *Montana v. Egelhoff*, 116 S. Ct. 2013, 2032 (1996) (Souter, J., dissenting), and *Albright v. Oliver*, 510 U.S. 266, 286 (1994) (Souter, J., concurring). The plurality opinion in *Casey*, of which Justice Souter was a joint author, also relied in part on the *Poe* dissent. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848-49 (1992).

¹⁴⁶ *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (citations omitted). Justice Harlan was vindicated when the Court essentially adopted his position four years later in *Griswold v. Connecticut*, 381 U.S. 478 (1965).

¹⁴⁷ *Glucksberg*, 117 S. Ct. at 2290.

¹⁴⁸ *Id.* at 2290-92; *Vacco v. Quill*, 117 S. Ct. 2293, 2302 (1997) (Souter, J., concurring in judgment).

3. Justice O'Connor's Opinion

Justice O'Connor, Chief Justice Rehnquist's pivotal fifth vote, signed the majority opinion but also filed a brief concurrence.¹⁴⁹ She joined the majority because she agreed that the Constitution supported no generalized right to commit suicide.¹⁵⁰ However, she bifurcated the majority's statement of the issue¹⁵¹ to emphasize that there was no need to address the narrower question of a terminally ill patient's "interest in controlling the circumstances of his or her imminent death" because neither New York nor Washington prohibited methods of pain treatment up to and including medicating the patient into unconsciousness.¹⁵² She identified the States' interests

¹⁴⁹ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2303 (1997) (O'Connor, J., concurring).

¹⁵⁰ *Id.*

¹⁵¹ The majority had framed the issue as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." *See id.* at 2269.

¹⁵² *Id.* at 2303 (O'Connor, J., concurring). If Justice O'Connor's reasoning implies that terminal sedation relieves all physical pain for all patients, it is apparently mistaken. *See* Howard Brody, *Assisted Death: A Compassionate Response to a Medical Failure*, 327 NEW ENG. J. MED. 1384, 1385 (1992) ("In a small percentage of cases palliative efforts will fail."); Larry Beresford, *Hospice and the End of Life Debate*, 9 CAL. HOSPICE REP. 8 (1991) ("Everybody who has worked in hospice for very long knows a handful of cases where the patient's suffering was simply untreatable."); *see also supra* note 134.

as including the difficulty in defining terminal illness¹⁵³ and protecting patients whose suicide assistance might not have been requested competently or voluntarily.¹⁵⁴

4. Justice Ginsburg's Opinion

Justice Ginsburg wrote, without elaboration, that she concurred in the judgments “substantially for the reasons stated by Justice O’Connor.”¹⁵⁵ Justice Ginsburg’s questions and comments during oral argument, however, confirm that she shared Justice O’Connor’s two primary concerns: that the Court ought not interfere at this time,¹⁵⁶ but that it should also remain vigilant as to the physical pain of individuals with terminal illnesses.¹⁵⁷

¹⁵³ If terminal illness is difficult to define, that has not deterred lawmakers from attempting to do so. The phrase “terminal illness” is defined by statute in virtually every state, usually as a condition expected to produce death within six months, *see infra* note 185, and legislatures have imposed on doctors the duty to assess terminal illness in a variety of contexts, *see, e.g.*, 42 U.S.C. §§ 1395f (a)(7)(A) (1994) (eligibility for certain Medicare programs); ALASKA STAT. § 21.55.110 (7) (Michie 1996) (eligibility for certain state health insurance benefits). The medical profession itself uses the terminal diagnosis as a clinical “bright line” prerequisite for eligibility for certain treatments, including terminal sedation. Paul Rousseau, *Terminal Sedation in the Care of Dying Patients*, 156 ARCH. INT. MED. 1785, 1785 (1996).

¹⁵⁴ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2303 (1997) (O’Connor, J., concurring).

¹⁵⁵ *Glucksberg*, 117 S. Ct. at 2310 (Ginsburg, J., concurring in judgments).

¹⁵⁶ *See, e.g.*, Transcript of Oral Argument, *Washington v. Glucksberg*, 1997 WL 13671, *30 (Jan. 8, 1997) (No. 96-110) (“everything that you said, it seems to me, could go on in a legislative chamber”); *id.* at *30-31 (expressing slippery slope concerns under “a grand due process clause”).

¹⁵⁷ *See, e.g.*, Transcript of Oral Argument, *Vacco v. Quill*, 1997 WL 13672, *5-6, *7, *8-9 (Jan. 8, 1997) (No. 96-1858) (asking about the “gray area” of terminal sedation); *id.* at *20 (asking about risks that doctors will be “fearful of putting people out of pain because they don’t know whether that’s going to constitute physician-assisted suicide or accepted relief of pain”).

5. Justice Breyer's Opinion

Justice Breyer concurred in the judgments and also in Justice O'Connor's opinion "except insofar as it joins the majority."¹⁵⁸ He agreed with the majority that the States' interests were sufficient to justify the distinction between removal of life support and physician-assisted suicide.¹⁵⁹ However, he was apparently the only member of the Court to frame the issue as whether the Constitution protected an individual's personal control over the manner of her death and avoidance of severe physical suffering.¹⁶⁰ He was satisfied with the statutes' validity because both New York and Washington allowed as much medication as a patient needed to alleviate pain.¹⁶¹ Justice Breyer concluded that legal circumstances would be different if, for example, state laws prohibited both assisted suicide and the provision of adequate end-of-life pain management.¹⁶²

¹⁵⁸ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2310 (1997) (Breyer, J., concurring in judgments).

¹⁵⁹ *Id.* at 2311.

¹⁶⁰ *Id.* He relied partly on Justice Harlan's *Poe v. Ullman*, 367 U.S. 497 (1961) dissent (and acknowledged Justice Souter's concurrence) for this approach. *Glucksberg*, 117 S. Ct. at 2311.

¹⁶¹ *Id.* Although he recognized that some patients do not receive adequate palliative care, he found this to be so for "institutional" reasons rather than due to unnecessarily prohibitive state laws. *Id.* at 2312.

¹⁶² *Id.* Most of the questions Justice Breyer asked at oral argument dealt with the large percentages of patients who die in pain despite that effective palliative treatment is theoretically available. *See, e.g.*, Transcript of Oral Argument, *Washington v. Glucksberg*, 1997 WL 13671, *25-26, *26-28 (Jan. 8, 1997) (No. 96-110). He also asked Laurence Tribe whether any Supreme Court decisions supported "a personal right against enduring pain and suffering." *See* Transcript of Oral Argument, *Vacco v. Quill*, 1997 WL 13672, *57 (Jan. 8, 1997) (No. 96-1858); *see also infra* note 181.

IV. POST-*GLUCKSBERG* CHALLENGES TO ASSISTED SUICIDE LAWS

All nine members of the Supreme Court agreed on a small number of points. First, all agreed that the class of mentally competent, terminally ill adults does not collectively enjoy a federal constitutional right to a lethal dose of physician-prescribed medication for the purpose of committing suicide.¹⁶³ Second, they all believed that the physician-assisted suicide question is essentially a legislative issue.¹⁶⁴ Third, and most importantly, apparently all nine members agreed that a narrower, more particularized constitutional challenge to the as-applied validity of a statute forbidding assisted suicide might possibly succeed.¹⁶⁵ Because each Justice had purported

¹⁶³ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997) (statute “does not violate the Fourteenth Amendment, either on its face or as applied to competent, terminally ill adults”) (internal quotation marks omitted); *id.* at 2275 (Souter, J., concurring in judgment) (“the statute’s application to the doctors has not been shown to be unconstitutional”); *id.* at 2303 (O’Connor, J., concurring) (joined by Breyer and Ginsburg, JJ.) (“the State’s interests . . . are sufficiently weighty to justify a prohibition against physician-assisted suicide”); *id.* at 2305 (Stevens, J., concurring in judgments) (“the ‘liberty’ protected by the Due Process Clause does not include a categorical right to commit suicide which itself includes a right to assistance in doing so”) (internal quotation marks omitted).

¹⁶⁴ *Id.* at 2268 (expressing reluctance to “place the matter outside the arena of public debate and legislative action”); *id.* at 2293 (Souter, J., concurring in judgment) (“I acknowledge the legislative institutional competence as the better one to deal with [the] claim at this time”); *id.* at 2303 (O’Connor, J., concurring) (joined by Breyer and Ginsburg, JJ.) (“There is no reason to think the democratic process will not strike the proper balance . . . ”); Transcript of Oral Argument, *Washington v. Glucksberg*, 1997 WL 13671, *12 (Jan. 8, 1997) (No. 96-110) (Justice Stevens stating, “one of the most powerful arguments in support of [the States’] position in this case is legislatures might adopt the remedy rather than the courts”).

¹⁶⁵ *Glucksberg*, 117 S. Ct. at 2309 (Stevens, J., concurring in judgments) (“I do not, however, foreclose the possibility that an individual plaintiff . . . could prevail in a more particularized challenge”); *id.* at 2275 n.24 (“Our opinion does not absolutely foreclose [Justice Stevens’s conclusion]”) (internal quotation marks omitted); *id.* at 2290 (Souter, J., concurring in judgment) (“Whether that interest

not to reach the issue of the circumstances under which such a challenge might prevail, this loophole is really more accurately described as a *potential* loophole. The “door” seems to be not necessarily “open,” but quite unarguably “unlocked.”

Two primary, related inquiries therefore remain for the lower courts. First, what is the precise scope of the as-applied challenge which the Court might tolerate? Second, what are the essential characteristics of the plaintiff who could bring such a claim? The majority opinions create this “door” in Footnotes 24 and 13 by explicitly incorporating Justice Stevens’ analysis and his interpretation of Chief Justice Rehnquist’s opinions, which left hints as to how a court might conduct these two inquiries. In addition, Justice O’Connor’s concurrence suggested an approach more flexible than that of the majority and qualified her vote with them.¹⁶⁶ The concurrences of Justices Stevens and O’Connor, therefore, appear to delineate the outer limits of any “open door.”¹⁶⁷

might in some circumstances, or at some time, be seen as ‘fundamental’ to the degree entitled to prevail is not, however, a conclusion that I need draw here”); *id.* at 2303 (O’Connor, J., concurring) (joined by Ginsburg, J.) (“[T]here is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience”); *id.* at 2312 (Breyer, J., concurring in judgments) (“Were the legal circumstances different . . . the Court might have to revisit its conclusions in these cases.”).

¹⁶⁶ See *supra* note 120.

¹⁶⁷ Because Justices Breyer and Ginsburg joined the core of Justice O’Connor’s opinion, the only unrepresented member of the Court in these considerations is Justice Souter. No member of the Court joined his opinion, and the majority criticized him for “abandon[ing]” the “retrained methodology” of its own history-and-traditions standard. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997). Of course, his vote remains relevant to future constitutional challenges given his willingness to revisit his conclusions. See *id.* at 2290 (Souter, J., concurring in judgment).

A. The Scope of an Adequately Framed As-Applied Challenge

As-applied challenges can vary in scope tremendously. Compare, for instance, *Wisconsin v. Yoder*,¹⁶⁸ upholding a mandatory school attendance law but excusing the entire Amish community from its reach, with *Cox v. Louisiana*,¹⁶⁹ upholding a picket-zone statute but declaring unconstitutional one demonstrator's conviction after a police officer mistakenly told him he was demonstrating far enough away. Although the capital punishment as-applied exceptions Justice Stevens cited in his *Glucksberg* concurrence are rather broad,¹⁷⁰ his analysis was actually much narrower than Justice O'Connor's. In fact, they each appear to predicate their analyses on opposite ends of the as-applied spectrum.

On the one hand, Justice O'Connor referred to the broad as-applied challenge on which the plaintiffs had originally sought a decision—whether the *entire* class of mentally competent adults with terminally illnesses enjoy a right to physician-prescribed medication in committing suicide—as the reason for her separate opinion and as unnecessary for the Court's disposition of the cases.¹⁷¹ On the other hand, Justice Stevens agreed with the majority that this broad as-applied challenge must fail, and instead argued that a *particular* patient's interests might outweigh those of the State in the patient's own *case-specific* circumstances.¹⁷²

Justice Stevens has espoused such a case-by-case approach in

¹⁶⁸ 406 U.S. 205 (1972).

¹⁶⁹ 379 U.S. 559 (1965).

¹⁷⁰ See *supra* note 123.

¹⁷¹ *Washington v. Glucksberg*, 117 S.Ct. 2302, 2303 (O'Connor, J., concurring).

¹⁷² See *id.* at 2309 (Stevens, J., concurring in judgments). The fact that the by-then deceased plaintiffs' prayers for relief did not expressly refer to their own individualized cases but rather sought the broader declaration to which Justice O'Connor referred, see *Quill v. Vacco*, 80 F.3d 716, 719 (2d Cir. 1996); *Compassion in Dying v. Washington*, 79 F.3d 790, 797 (9th Cir. 1996) (en banc) allowed the Court to evade applying the Footnotes 24 and 13 "door" to the cases before it.

the past. For example, in *In re Michael H. v. Gerard D.*,¹⁷³ the Court upheld the validity of a statutory presumption that the child of a married woman was her husband's, even when all parties conceded that the child was actually the product of the woman's extra-marital affair. Justice Stevens concurred in the judgment on the ground that the biological father had had a statutory opportunity to demonstrate to the trial court that, notwithstanding the presumption, allowing him visitation was in the child's best interests. Although the father in that case had failed to meet that standard, Justice Stevens agreed that the statutory presumption did not violate the father's constitutional rights because this opportunity was available.¹⁷⁴

Justice Stevens apparently envisioned a similar scenario for the practice of physician-assisted suicide, in which a terminally ill person in severe pain may petition a court for judicial assessment of her eligibility for a physician's lethal prescription.¹⁷⁵ If this interpretation of Justice Stevens's opinion is correct, the majority adopted it in Footnotes 24 and 13 by agreeing that individual plaintiffs might prevail in their own particular claims and citing (only) to Justice Stevens's formulation.¹⁷⁶ Justice O'Connor's opinion, which distinguished the plaintiffs' broad-based challenge from the extent of the Court's decision, does not seem to be inconsistent with this case-by-case approach for two reasons. First, Justice O'Connor

¹⁷³ 491 U.S. 110 (1989).

¹⁷⁴ *Id.* at 133-34. See also *Hodgson v. Minnesota*, 497 U.S. 417 (1990) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 922 n.8 (1992) (Stevens, J., concurring in part and dissenting in part), in which Justice Stevens approved of laws requiring parental notification before a minor may obtain an abortion, relying on the availability of a "judicial bypass" mechanism through which a minor may procure an abortion without parental notification by petitioning a court to assess her competency and best interests.

¹⁷⁵ The clearly prospective phrasing throughout his opinion implied more than a mere defense to criminal prosecution or jury power of acquittal after the fact of physician assistance. The majority employed similar terminology in adopting Justice Stevens's analysis. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 n.24 (1997); *Vacco v. Quill*, 117 S. Ct. 2293, 2302 n.13 (1997).

¹⁷⁶ See *Glucksberg*, 117 S. Ct. at 2275 n.24; *Quill*, 117 S. Ct. at 2302 n.13.

presumably agreed with Footnotes 24 and 13 in that she signed the majority opinion and that its other four adherents almost certainly included these concessions specifically to secure her signature.¹⁷⁷ Second, if the class of mentally competent adults with terminal illnesses do enjoy the right of which Justice O'Connor purports not to reach consideration, individual members of that class would seem to enjoy the same right.

Justice O'Connor's own conception of the legal circumstances in which the broad-based challenge would succeed, however, is significantly less likely to bear fruit. First, at most three (and more likely two) other members of the Court shared her views. Only Justices Breyer and Ginsburg commented on her concurrence,¹⁷⁸ and Justice Souter's analysis was at best merely compatible with it.¹⁷⁹ Second, and more importantly, the legal environment which Justice O'Connor considers a prerequisite for the success of the plaintiffs' challenge does not exist and is extremely unlikely to ever develop. Like Justice Breyer, she considered the plaintiffs' constitutional concerns to be adequately addressed by the theoretical availability in New York and Washington of palliative technology capable of eliminating virtually all pain, even if at the risk of expedited death.¹⁸⁰ However, neither aggressive pain therapy nor terminal sedation

¹⁷⁷ See *supra* note 118. Even if Justice O'Connor did disagree, Justice Stevens would provide the fifth vote for his own formulation.

¹⁷⁸ Both joined her opinion with minor qualification to indicate their departure from the majority's formulation. See *Washington v. Glucksberg*, 117 S. Ct. 2302, 2310 (1997) (Ginsburg, J., concurring in judgments); *id.* (Breyer, J., concurring in judgments).

¹⁷⁹ See *supra* discussion Part III.B.2. Justice Souter mentioned that a challenge to the validity of the ban might deserve to prevail "in some circumstances, or at some time," but did not elaborate. See *Glucksberg*, 117 S. Ct. at 2290 (Souter, J., concurring in judgment). Justice O'Connor, meanwhile, found the question unnecessary to resolve given that state laws currently pose no obstacle to palliative care for the dying. See *id.* at 2303 (O'Connor, J., concurring).

¹⁸⁰ See *supra* discussion Part III.B.3.

appear to be illegal anywhere in the country.¹⁸¹ Fueled in part by the recent controversy over physician-assisted suicide, several states in the last few years have in fact stepped up efforts to improve palliative care for the dying.¹⁸² Neither has the Supreme Court ever recognized a general constitutional right to be free from physical pain not inflicted by the State itself.¹⁸³ A district court, therefore, would be hard-pressed to find a constitutional right to physician-assisted suicide under any potential loophole Justice O'Connor's concurrence

¹⁸¹ See YALE KAMISAR, *Physician-Assisted Suicide: the Last Bridge to Active Voluntary Euthanasia*, in EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES 240 (John Keown ed., 1995) ("[T]he law . . . recognizes the principal of the 'double effect'. . . by exempting 'prescribing, dispensing or administering' medication or treatment designed 'to relieve pain or discomfort and not to cause death, even if the medication or procedure may hasten or increase the risk of death.'"). Some states have codified their approval of terminal sedation. See, e.g., LA. REV. STAT. ANN. § 14:32.12 (C)(2) (West 1997); S.D. CODIFIED LAWS § 22-16-37.1 (Michie 1997).

¹⁸² More than a dozen states have passed legislation in the last five years designed to improve pain management for the terminally and chronically ill. See, e.g., "Intractable Pain Treatment Act," MO. REV. STAT. § 334.105, *et seq.* (West 1979 & Supp. 1997) (easing restrictions on use of medications); NEV. REV. STAT. §§ 630.020, 630.3066, 633.521 (1995) (same); OR. REV. STAT. § 677.470, *et seq.* (1990 and Supp. 1997) (same); see also TEX. EDUC. CODE ANN. § 61.785, TEX. HEALTH & SAFETY CODE § 102.009 (West 1994 & Supp. 1997) (improving pain management education for physicians); MICH. COMP. LAWS § 333.16204 (1996) (MICH. STAT. ANN. § 14.15 (Callaghan 1996)) (same).

¹⁸³ A prisoner enjoys rights to freedom from physical pain inflicted by the State in certain circumstances. *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). This right is also implicated when the State demonstrates deliberate indifference to a prisoner's own physical pain. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). However, the Court has distinguished these cases from situations in which a state child protection agency failed to protect a child from his father's physical abuse, reasoning that the State assumes a duty to protect a prisoner by taking him into involuntary custody. See *DeShaney v. Winnebago Cty. Dep't of Social Services*, 489 U.S. 189 (1989). But see *Taylor v. Ledbetter*, 818 F.2d 791, 794 (11th Cir. 1987) (en banc) (ruling that abused child enjoyed "the right to be free from the infliction of unnecessary pain" when involuntarily placed in foster care), *cert. denied*, 489 U.S. 1065 (1989).

might establish. If an open door exists, it belongs to Justice Stevens.

B. Profiling the Post-*Glucksberg* Plaintiff

Justice Stevens's concurrence also illustrates what a potential plaintiff in a particularized challenge might look like, under both Due Process and Equal Protection theories. His opinion does so by explaining the circumstances under which the interests of a patient making a decision to seek suicide assistance might override in her own individual case the State's legitimate justification for a blanket ban.¹⁸⁴ Once again, the patient would apparently petition a court and request an assessment of her personal situation. If the court agreed that the State's interests did not apply to the plaintiff, presumably the court would be empowered under *Glucksberg* and *Quill* to declare the state's law barring physician-assisted suicide unconstitutional as applied to her and issue an order barring its enforcement against the patient's assisting physician.¹⁸⁵

With respect to such a claim predicated on a Due Process theory, Justice Stevens cited *Cruzan* for the proposition that "some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs."¹⁸⁶ Although he did not define the expression "threshold of death," he made clear that only persons with a terminal diagnosis would be capable of demonstrating sufficient interests in a physician's lethal prescription to override the

¹⁸⁴ See *supra* text accompanying notes 133-35, 138-42.

¹⁸⁵ The action would most likely be predicated on 42 U.S.C. § 1983 (1994), as were the original complaints in *Glucksberg* and *Quill*. See *Quill v. Vacco*, 80 F.3d 716, 718 (2d Cir. 1996); *Compassion in Dying v. Washington*, 49 F.3d 586, 589 (9th Cir. 1995).

¹⁸⁶ *Washington v. Glucksberg*, 117 S. Ct. 2302, 2307 (1997) (Stevens, J., concurring in judgments).

law.¹⁸⁷ Justice Stevens went on to characterize the interest of the State in preventing suicide induced by depression or third-party coercion as “compelling” but found that this interest cannot attach when the patient is not in fact depressed or being coerced.¹⁸⁸ His conclusion, therefore, is virtually identical to the claims the *Glucksberg* and *Quill* plaintiffs had originally made: that a mentally competent, terminally ill adult making a voluntary request for a lethal prescription from her doctor enjoys a constitutional right to be free from the State’s interference.¹⁸⁹ The difference is that Justice Stevens would permit a State to prohibit suicide assistance generally, leaving such rare cases to be judicially exempted, rather than (as the challenging litigants had sought) striking down the prohibitions altogether and leaving to State regulation the effort to exclude those ineligible.¹⁹⁰

A claim based on an Equal Protection theory would be more complicated. In addition to demonstrating to a court that none of the State’s interests implicated in a Due Process challenge applied,¹⁹¹ a

¹⁸⁷ There is general consensus as to the legal definition of “terminal illness.” Nearly every state statutorily defines the term as a condition which a physician has diagnosed as likely to produce death within six months. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1250 (h)(i)(2)(B) (1996); CONN. GEN. STAT. § 38a-553 (a)(6) (1996); MINN. STAT. § 62A.616 (1996); N.C. GEN. STAT. § 131E-201 (4) (1996); VA. CODE ANN. § 32.1-162.1 (1997); *see also* 42 U.S.C. § 1395x(dd)(3)(A) (1996).

¹⁸⁸ *Glucksberg*, 117 S. Ct. at 2308.

¹⁸⁹ *See Quill v. Vacco*, 80 F.3d 716, 719 (2d Cir. 1996) (plaintiffs seeking injunction of statutes “as applied to physicians who assist mentally competent, terminally ill adults who choose to hasten inevitable death”).

¹⁹⁰ *Glucksberg*, 117 S. Ct. at 2305. The circuit courts which had struck down the Washington and New York statutes had stated that legislative regulation of physician-assisted suicide was constitutionally permissible, and even offered suggestions for doing so. *See Quill v. Vacco*, 80 F.3d 716, 730-31 & n.4 (2d Cir. 1996); *Compassion in Dying v. Washington*, 79 F.3d 790, 832-33 (9th Cir. 1996).

¹⁹¹ *See Vacco v. Quill*, 117 S. Ct. 2293, 2295 (1997) (“New York’s reasons for recognizing and acting on [the action-inaction] distinction . . . are discussed in greater detail in our opinion in *Glucksberg*[.]”). Justice Souter described the Equal Protection Clause as “do[ing] essentially nothing in a case like this that the Due Process Clause cannot do on its own.” *Washington v. Glucksberg*, 117 S. Ct. 2258,

petitioning patient would also need to show that the action-inaction distinction did not apply in her own particular case. First, she would need to demonstrate that either terminal sedation or refusal of treatment is legal in her state.¹⁹² This ought not be difficult because both are apparently legal everywhere in the nation.¹⁹³ Second, she would need to demonstrate that her primary intention was merely to relieve her suffering despite her knowledge that her own death would be an additional consequence.¹⁹⁴ Finally, she would need to establish that her physician was willing to give her a lethal prescription with the intention not of inducing her death but of merely obeying her wishes or giving her a sense of control over the dying process.¹⁹⁵

2277 n.3 (1997) (Souter, J., concurring in judgment).

¹⁹² Justice Stevens considered these options as equivalents for purposes of this constitutional inquiry. *See id.* at 2309-10 (Stevens, J., concurring in judgments). Note that Justices O'Connor and Ginsburg disagreed with Justice Stevens's assessment of the relevance of terminal sedation: Justice Stevens suggested that he might permit suicide assistance should terminal sedation be the patient's only other option (just as if that option were continued pain), *see id.* at 2307-08, while Justices O'Connor and Ginsburg found the availability of terminal sedation as *itself* the justification for banning assisted suicide as a method for relieving suffering, *see id.* at 2303 (O'Connor, J., concurring), 2311-12 (Breyer, J., concurring in judgments).

¹⁹³ *See supra* note 179.

¹⁹⁴ *Glucksberg*, 117 S. Ct. at 2310 (Stevens, J., concurring in judgments) ("There may be little distinction between the intent of a terminally-ill patient who decides to remove her life-support and one who seeks the assistance of a doctor in ending her life; in both situations, the patient is seeking to hasten a certain, impending death."); *id.* ("The purpose of terminal sedation is to ease the suffering of the patient and comply with her wishes, and the actual cause of death is the administration of heavy doses of lethal sedatives. This same intent and causation may exist [in physician-assisted suicide].").

¹⁹⁵ *See id.* ("The doctor's intent might also be the same in prescribing lethal medication as it is in terminating life support. . . . [A] doctor who prescribes lethal medication does not necessarily intend the patient's death-rather that doctor may seek simply to ease the patient's suffering and to comply with her wishes."); *id.* at 2310 n.15 ("[I]t's not at all clear that the physician's intent is that the patient be made dead[.]. Many patients prescribed lethal medications never actually take them; they merely acquire some sense of control in the process of dying that the availability of those medications provides.") (citation and internal quotation marks

Perhaps the greatest obstacle to an individual Equal Protection claim, however, would be that two Justices beyond the majority flatly rejected it: Justice Breyer agreed with the Court's articulation of the action-inaction distinction in its entirety,¹⁹⁶ and Justice Souter argued that a physician writing a lethal prescription was necessarily doing so "to serve an affirmative intent to die" even if the patient's death was not the physician's direct purpose.¹⁹⁷ For all of these reasons, the petitioning patient would probably opt to predicate her individual challenge on the Due Process Clause rather than a more cumbersome and less promising Equal Protection theory.

Presumably, the patient would prove her Due Process case with affidavit and/or live testimony. The patient's physician would need to attest to the patient's terminal diagnosis¹⁹⁸ and satisfactory mental condition.¹⁹⁹ The patient would herself need to testify that she experienced intolerable physical pain which other techniques had failed to alleviate;²⁰⁰ that her relationship with her physician would

omitted).

¹⁹⁶ *Id.* at 2311 (Breyer, J., concurring in judgments).

¹⁹⁷ *Id.* at 2291 n.16 (Souter, J., concurring in judgment); *see also id.* at 2277 n.3.

¹⁹⁸ *See id.* at 2307 (Stevens, J., concurring in judgments) ("individuals who . . . are already on the threshold of death have a constitutionally protected interest"); *id.* at 2311 (Breyer, J., concurring in judgments) ("[T]he avoidance of severe physical pain (*connected with death*) would have to comprise an essential part of any successful claim") (emphasis added); *id.* at 2290 (Souter, J., concurring in judgment) ("There can be no stronger claim to a physician's assistance than at the time when death is imminent.").

¹⁹⁹ *See Washington v. Glucksberg*, 117 S. Ct. 2258, 2308 (Stevens, J., concurring in judgments) ("[T]he State has a compelling interest in preventing persons from committing suicide because of depression But [this interest] does not apply to an individual . . . who is not suffering from depression"); *compare Thor v. Superior Court*, 855 P.2d. 375 (Cal. 1993) (depressed patient competent to decide to forgo life-sustaining treatment). This prerequisite would probably also include an assurance that the patient's illness had not itself impaired any cognitive functioning.

²⁰⁰ *Id.* at 2303 (O'Connor, J., concurring) (joined by Ginsburg, J.) ("[State interests prevail because] a patient . . . who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering"); *id.*

not suffer from her physician's complicity in her suicide;²⁰¹ and that she had reached her decision voluntarily²⁰² and free of influence from either the financial cost of continued treatment²⁰³ or pressure from

at 2307 (Stevens, J., concurring in judgments) ("Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is [protected]"); *id.* at 2311 (Breyer, J., concurring in judgments) ("[T]he avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful claim"). Note that an attestation to the ineffectiveness of pain relief techniques may not be sufficient for Justices Ginsburg and O'Connor, who had emphasized that a right to assisted suicide would be implicated (if at all) only if barriers to pain relief were *legally* imposed rather than attributable to "institutional reasons or inadequacies or obstacles." *Id.* at 2312; *accord id.* at 2303 (O'Connor, J., concurring).

²⁰¹ While this would seem self-evident in the case of any patient seeking her physician's assistance in suicide, the *Glucksberg* majority made clear that the State's interest in maintaining the integrity of the practice of medicine extended beyond the medical profession generally and reached individual physician-patient relationships. *See id.* at 2273 ("The patient's trust in the doctor's whole-hearted devotion to his best interests will be hard to sustain [if assisted suicide is legalized]") (internal quotation marks omitted). An individual patient would thus need to explicitly distinguish that scenario from her own case. *See id.* at 2308 (Stevens, J., concurring in judgments) ("[F]or some patients, it would be a physician's refusal to dispense medication to ease their suffering and make their death tolerable and dignified that would be inconsistent with the [physician's] healing role.").

²⁰² *Id.* at 2308 ("[T]he State's legitimate interest in preventing abuse does not apply to an individual . . . who makes a rational and voluntary decision to seek assistance in dying.").

²⁰³ *See id.* at 2273 ("If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs.").

any other person.²⁰⁴ If the State did not dispute these factual allegations,²⁰⁵ the burden would apparently shift to the State to prove as a matter of law why the plaintiff should not be entitled to her requested relief,²⁰⁶ an injunction against State interference with or prosecution for her doctor's complicity in her suicide. Nevertheless, if any State interests exist which would be adequate to meet this burden, no member of the Supreme Court offered guidance as to how to identify or present them.

The next few years will reveal whether terminally ill patients will indeed seek to petition courts for judicial "permission" to receive physician assistance in suicide under the authority of Footnotes 24 and 13, and how the courts will handle such petitions. If the courts do come to grant these petitions with any degree of frequency, then the Supreme Court may ironically have birthed a system of judicial oversight of dignified death²⁰⁷ despite the specific intentions of some

²⁰⁴ It may be that this attestation should be made under the terminology of state common-law or statutory definitions of undue influence. *See, e.g.,* Smith v. Smith, 482 So.2d 1161, 1163 (Ala. 1985) (setting forth state common law definition of undue influence); Ward v. Ward, 215 N.W.2d 3, 5-6 (1997) (same). The testimony might also need to include the patient's assurance that she had felt neither victimized nor influenced by any negative attitudes or stereotypes. *See Glucksberg*, 117 S. Ct. at 2273-74 (State's interest in preventing abuse extends to protecting the terminally ill from such prejudices).

²⁰⁵ Although neither Washington nor New York challenged any of the plaintiffs' factual assertions as to their mental and physical conditions in *Compassion* or *Quill*, a state's attorney general might opt to do so in a more particularized challenge. The State might, for example, require the patient to submit to physical and psychological examination by its own doctors. *See* Fed. R. Civ. P. 35.

²⁰⁶ Once a challenger meets her burden of production so as to demonstrate a prima facie case of governmental action in conflict with the Constitution, the burden shifts to the government to justify the infringement. That burden requires a showing of both (1) the legitimacy and strength of the governmental interest, and (2) the factual nexus between the governmental interest and the action taken to achieve that interest. David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 761-62 (1994).

²⁰⁷ *Cf. Belchertown v. Saikewicz*, 373 Mass. 728, 755-59 (1977), in which the Supreme Judicial Court of Massachusetts assumed and delineated the state judiciary's supervisory role over decisions to either direct or enjoin medical

of its members.²⁰⁸ Rather than placing the judicial branch at the core of defining the parameters of a newly-recognized right (as it had in 1973 with *Roe v. Wade*), the Supreme Court may have instead planted the seed for a judicial screening process for assisted suicide in which terminally ill “applicants” plead their cases to judges who may or may not grant their requests for lethal medications.²⁰⁹ Surprisingly enough, such a system would not be unprecedented: in ancient Greece, citizens could obtain hemlock from local magistrates and commit suicide after stating their reasons to, and receiving permission

treatment in incompetent persons, stating:

We do not view the judicial resolution of this most difficult and awesome question—whether potentially life—prolonging treatment should be withheld from a person incapable of making his own decision—as constituting a “gratuitous encroachment” on the domain of medical expertise. Rather, such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this ideal is our responsibility and that of the lower court, and is not to be entrusted to any other group purporting to represent the “morality and conscience of our society,” no matter how highly motivated or impressively constituted.

Id. at 759.

²⁰⁸ At oral argument, Chief Justice Rehnquist repeatedly expressed concern that recognition of any “right to die” would foment a flood of constitutional litigation. He predicted that “the next couple of generations are going to have to deal with” issues regarding the validity of state regulation of physician-assisted suicide—“the same thing I suspect that perhaps has happened with the abortion cases.” Transcript of Oral Argument, *Washington v. Glucksberg*, No. 96-110, 1997 WL 13671, *38-39 (Jan. 8, 1997). Justice O’Connor agreed, predicting “if we upheld [plaintiffs’] position, it would result in a flow of cases through the court system for heaven knows how long.” *Id.* at *39. See also *id.* at *23 (Justice Ginsburg asking, “[i]s this ever a proper question for courts as opposed to legislatures to decide?”).

²⁰⁹ See *People v. Kevorkian*, 527 N.W.2d 714, 747 (1994) (Levin, J., concurring in part and dissenting in part) (“I would hold that a terminally ill person may apply to the [trial] court for an order declaring entitlement to seek medical assistance, and that [the statute prohibiting suicide assistance] is violative of the Due Process Clause as applied to that person.”).

from, the Senate.²¹⁰ These laws were intended to prevent impulsive self-destruction and to enable rapid, painless suicide when reasonable.²¹¹ A modern-day analogue may be the “judicial bypass” mechanism by which many States regulate abortions in minors.²¹² Under these systems, which have the Supreme Court’s blessing,²¹³ an unemancipated young woman may procure an abortion against her parent’s wishes only if she first petitions a court which determines that she is giving her informed consent and/or that the abortion is in her best interests. If lower courts recognize and develop a comparable case-by-case system for physician-assisted suicide, it might feasibly permit some terminally ill patients to obtain the dignified death they seek while effectively preventing the abuses and “slippery slope” dangers which had so troubled the Justices.

C. The First Test Case? *McIver v. Krischer*

There has yet been only one instance in which a court has faced the validity of a physician-assisted suicide prohibition since the *Glucksberg* and *Quill* rulings. In 1996, three terminally ill patients filed suit in a Florida state court seeking a declaration that a named physician, Dr. Cecil McIver, could not be prosecuted or professionally disciplined in the event that he assisted their suicides

²¹⁰ Alfred Alvarez, *The Background*, in *SUICIDE: THE PHILOSOPHICAL ISSUES* 18 (M. Pabst Battin & David J. Mayo eds., 1980); EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* 330 (John A. Spaulding & George Simpson trans., Free Press 1951).

²¹¹ George Howe Colt, *The Enigma of Suicide* 147 (1991). Depending on the region of Greece, acceptable reasons included old age, sickness, and misfortune. *Id.*; see also DURKHEIM, *supra* note 208, at 330.

²¹² See, e.g., ALA. CODE § 26-21-3 (1994); KAN. STAT. ANN. § 311.732 (1995); MO. REV. STAT. § 188.028 (1996); R.I. GEN. LAWS § 23-4.7-6 (Supp. 1996); W. VA. CODE § 16-2F-3 (1995).

²¹³ See *Planned Parenthood Ass’n of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 490-93 (1993); *Ohio v. Akron Center for Reproductive Health, Inc.*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 899-900 (1992).

by providing them with lethal prescriptions.²¹⁴ Unlike all prior assisted-suicide cases (including the *Compassion* and *Quill* lawsuits), in this suit the plaintiffs sought to enjoin enforcement of the state statute²¹⁵ against a particular doctor only, and in favor of particular terminally ill patients.²¹⁶ Two of these patients died before trial, leaving the request of AIDS patient Charles E. Hall the only non-moot portion of the litigation.²¹⁷ In an unpublished decision, the trial court made the following factual findings:

- (1) Mr. Hall was terminally ill;
- (2) Mr. Hall was alert and intelligent, and he exhibited a clear understanding of his medical condition and its consequences;
- (3) a psychiatrist had evaluated Mr. Hall and determined that he was mentally competent;
- (4) Mr. Hall wished to live but sought merely to end his suffering by self-administering a lethal dose of medication that Dr. McIver would prescribe to him;
- (5) Mr. Hall's judgment was unaffected by any undue influence or mental illness;
- (6) a physician like Dr. McIver would be sufficiently skilled to

²¹⁴ See *McIver v. Krischer*, No. CL-96-1504-AF, 1997 WL 225878 (Fla. Cir. Ct. Jan 31, 1997).

²¹⁵ FLA. STAT. ANN. § 782.08 (West 1992) states: "Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree[.]"

²¹⁶ In their complaint, the plaintiffs prayed the court to rule that "Castonguay, Cron and Hall each has a constitutional right . . . to make the decision to terminate his own suffering, and to seek his physician's assistance to do so, under the circumstances of this case" and to issue a "temporary and permanent injunction prohibiting the State Attorneys from prosecuting Dr. McIver under Section 782.08, or any other Florida criminal statute, for engaging in the conduct specifically found by the Court's declaratory judgment to be constitutionally protected[.]" See *Complaint in McIver v. Krischer*, No. CL-96-1504-AF, 1997 WL 225878 (Fla. Cir. Ct. Jan. 31, 1997).

²¹⁷ See *McIver v. Krischer*, No. CL-96-1504-AF, 1997 WL 225878 (Fla. Cir. Ct. Jan. 31, 1997).

know how to use medications to successfully induce a quick and painless death;

(7) Dr. McIver's professional judgment was that granting Mr. Hall's request for a lethal prescription would be medically and ethically appropriate.²¹⁸

Choosing to follow the Second Circuit's *Quill* decision, the trial court ruled that physician-assisted suicide was protected by the Equal Protection Clause.²¹⁹ The court entered declaratory judgment for the plaintiffs, enjoined the State from interference with Dr. McIver's assistance, and ordered that Dr. McIver may prescribe Mr. Hall lethal drugs "only after consultation and determination by both physician and patient that Mr. Hall is (1) competent, (2) imminently dying, and (3) prepared to die."²²⁰ The court added:

It bears noting that Dr. McIver approached this issue in the manner that is appropriate, by seeking a declaratory judgment while refusing to break the law. This demonstrates respect for the system, in contrast to the conduct, as reported in the media, of Dr. Jack Kevorkian, who plunges ahead based on his personal beliefs, with no oversight, and then dares the authorities to prosecute him. Dr. McIver's approach, unlike that of Dr. Kevorkian, has enabled this Court to fully determine the facts underlying his patients. [sic] Our society and legal system would certainly not be well served by forcing a person such as Dr. McIver to

²¹⁸ *Id.*

²¹⁹ *Id.* The court also determined that the right was protected under the Florida State Constitution's Privacy Amendment, which states in part, "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." *Id.* (citing FLA. CONST. art. I, § 23).

²²⁰ *Id.* The trial court "emphasized that the findings, decision, and direction in this case relate to these parties only[.]" *Id.*

conduct himself in the manner of Dr. Kevorkian in order to obtain an adjudication of the constitutional issue Dr. McIver raises.²²¹

Of course, the plaintiffs had initiated their suit long before the Supreme Court's *Glucksberg* and *Quill* decisions, and thus they could not have known to plead and prove the intricacies which Justice Stevens's conception of a colorable claim would require.²²² Still, most of those intricacies had been either alleged in Mr. Hall's complaint or found as fact at trial regardless.²²³ Mr. Hall's suit would therefore appear to be the closest example of Justice Stevens's paradigm case yet, decided even before the Supreme Court's decisions were released.

Nevertheless, the Florida Supreme Court reversed the trial court's ruling on expedited appeal and disposed of the federal challenges citing, with virtually no discussion, the just-announced *Glucksberg* and *Quill* decisions.²²⁴ The court neither mentioned Footnotes 24 and 13, nor considered the State's interests as applied to the specific plaintiffs, despite the fact that the suit was, apparently, the very particularized challenge those footnotes describe.²²⁵ Whether the *Krischer* court's failure to discuss the "open door" was inadvertent or deliberate is unclear. Either way, of course, *Krischer* may be the first example of the failure of Justice Stevens's case-by-

²²¹ *Id.* at n.4.

²²² See discussion *supra* Part IV.B.

²²³ The only allegations Mr. Hall had not made which would be important under a Footnote 13 challenge included attestations that Dr. McIver's intention was merely to obey Mr. Hall's wishes rather than to induce his death, see *supra* note 193, that Mr. Hall would not feel his doctor-patient relationship with Dr. McIver would suffer as a result of the assistance, see *supra* note 201 and accompanying text, and that Mr. Hall's decision was unmotivated by financial considerations. See *supra* note 203 and accompanying text.

²²⁴ See *Krischer v. McIver*, 697 So.2d 97, 100 (Fla. 1997). The panel also reversed the trial court's ruling under the Florida State Constitution. *Id.* at 100-04; see *supra* note 219.

²²⁵ See discussion *supra* Part III.

case system to develop. A concurring judge in *Krischer*, who like his colleagues neglected to undertake any particularized calculus, nonetheless commented:

In reality, this Court may never be able to find an exception for an as applied challenge to the statute until extensive evaluation of the problems involved in this issue occurs and the many difficult questions are answered. The public would be much better served if the legislature, with significant input from the medical and scientific community, would craft appropriate exceptions to the general prohibition of assisted suicide, which include suitable standards, definitions, and procedures ensuring that the use of assisted suicide would truly be used [sic] to assist only those individuals who suffer unbearable pain in the face of certain death.²²⁶

Despite Justice Stevens's suggestions for a particularized as-applied challenge, lower courts may be unlikely to see past the decisive majority holdings in *Glucksberg* and *Quill*.²²⁷ In light of *Krischer*, a plaintiff seeking judicial permission for suicide assistance might therefore have to force a court to address the "open door" by invoking Footnotes 24 and 13 explicitly and by framing her pleadings and supporting affidavits in strict accordance with Justice Stevens's *Glucksberg* concurrence. Only then will it be seen whether such a challenge can succeed.²²⁸

²²⁶ *Krischer*, 697 So.2d at 107 (Overton, J., concurring).

²²⁷ See *supra* text accompanying notes 107-09.

²²⁸ As of the date this Comment went to press, the only other court yet to rely on the substantive holdings of *Glucksberg* and *Quill* is the Washington Supreme Court in *Seeley v. Washington*, 940 P.2d 604 (Wash. 1997). There, the facial and as-applied constitutional challenges brought against a statute which forbid a cancer patient from smoking marijuana to relieve the painful effects of chemotherapy were rejected. Like Mr. Hall in *Krischer*, the plaintiff had initiated the lawsuit before

V. CONCLUSION

On June 26, 1997, the United States Supreme Court unanimously declared that the Fourteenth Amendment to the U.S. Constitution does not prohibit the states from enacting laws making it a crime for physicians to assist the suicides of their terminally ill, mentally competent patients.²²⁹ That same day, a jury in Florida acquitted a doctor charged with first-degree murder for injecting a massive dose of morphine, valium, and potassium chloride into a cancer patient in severe pain and within days of death, and inaccurately recording the action in medical records.²³⁰ Also that same day, the body of a Nevada woman who had suffered from a painful condition known as chronic fatigue syndrome was discovered in a motel room near Detroit, Michigan with a note pinned to her clothes instructing authorities to contact Jack Kevorkian's attorney.²³¹ Although the Supreme Court has proclaimed that there is no generalized "right to die," people throughout the nation continue to exercise that right.

Some of these people may eventually do so legally by invoking Footnotes 24 and 13 of the Court's *Glucksberg* and *Quill* opinions, which Laurence Tribe has proclaimed as the vehicle for future federal constitutional challenges—an "open door."²³² These persons "could prevail in a more particularized challenge" than those the Court has rejected, apparently by petitioning courts to assess their individual circumstances for evidence that the State's legitimate interests in a blanket prohibition of physician-assisted suicide do not apply to

Glucksberg and *Quill* were issued and he thus could not have attempted to articulate a "particularized" challenge.

²²⁹ *Vacco v. Quill*, 117 S. Ct. 2293 (1997); *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

²³⁰ Sue Landry, *Jury Acquits Sebring Doctor in Murder Trial*, Ledger (Lakeland, Fla.), June 27, 1997, at A1. The jury deliberated for approximately four-and-one-half hours. *Id.*

²³¹ *Kevorkian Lawyer Hired in Death Case*, N.Y. TIMES, June 28, 1997, at 1-10.

²³² See *supra* notes 3 and 17.

themselves personally.²³³ Of course, the Court does not purport to reach the question of whether or not the Constitution would compel the granting of such a request, and offers little guidance to courts and potential litigants on the matter. Rather than opening the door, the Court merely unlocked it—the concurrences did so hesitantly, the majority grudgingly. The only subsequent lower-court “particularized challenge” brought against an assisted suicide statute has failed, without so much as an acknowledgment of the door’s existence.²³⁴ It is unclear whether patients and other courts will similarly fail to explore the dimensions of this door. What is clear is only that, as Justice Stevens recognized, “[f]uture cases will determine whether such a challenge may succeed.”²³⁵

²³³ See discussion *supra* Part IV.A-B.

²³⁴ See discussion, *supra* Part IV.C.

²³⁵ *Washington v. Glucksberg*, 117 S. Ct. 2258, 2309 (1997) (Stevens, J., concurring in judgments); *accord* *Compassion in Dying v. Washington*, 79 F.3d 790, 836 (9th Cir. 1996) (en banc) (“Whatever the outcome here, a host of painful and agonizing issues involving the right to die will continue to confront the courts.”).

